Supreme Court, U.S.
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In The

Supreme Court of the United States

TIDYMAN'S, INC., a WASHINGTON CORPORATION,

Petitioner,

v.

CONNIE HEMMINGS and PATTY LAMPHIEAR,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the divided Ninth Circuit properly held – in conflict with this Court's decision in *Kotteakos v. U.S.*, 328 U.S. 750 (1946) and other federal courts of appeal – that the plain error doctrine requires a "concrete showing of prejudice."

2. Whether the Ninth Circuit properly held – in conflict with this Court's decision in *Bazemore v. Friday*, 478 U.S. 385 (1986) and the decisions of other federal courts of appeal – that a multiple regression analysis which failed to include employees' individual qualifications, preferences, and education was nevertheless admissible in an employment discrimination case.

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

Petitioner, Tidyman's, Inc., was the defendant in the district court and appellant/cross-appellee before the United States Court of Appeals for the Ninth Circuit. Pursuant to S.Ct. Rule 29.6, Petitioner notes that it is a Washington corporation incorporated under the laws of the state of Washington, which has changed its name to Tidyman's Management Services, Inc. Tidyman's Management Services, Inc. is the 60% owner of a Delaware limited liability company named Tidyman's, L.L.C., which is also 40% owned by SuperValu, Inc., a Missouri Corporation.

Respondents Connie Hemmings and Patty Lamphiear were plaintiffs before the district court and plaintiffs/cross-appellees before the United States Court of Appeals for the Ninth Circuit.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT	ii
TABLE OF AUTHORITIES	v
PETITION FOR A WRIT OF CERTIORARI	1
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	8
1. The Ninth Circuit's Decision Conflicts with this Court's Precedents on the Plain-Error Doctrine	9
2. The Ninth Circuit's Decision Conflicts with the Court's Decision in *Bazemore v. Friday* and the Decisions of Other Federal Courts of Appeal on the Admissibility of Statistical Evidence in Employment Discrimination Cases	21
CONCLUSION	29
APPENDICES	
APPENDIX A: Opinion of the Ninth Circuit Court of Appeals, filed April 11, 2002	App. 1
APPENDIX B: Order of the District Court Denying New Trial, filed August 20, 1999	App. 73

TABLE OF CONTENTS – Continued

Page

APPENDIX C:
Amended Judgment for Attorneys Fees, filed August 31, 1999 ..... App. 90

APPENDIX D:
Transcript of Post Trial Proceedings, dated June 30, 1999 ..... App. 92

APPENDIX E:
Amended Judgment in Favor of Connie Hemmings, filed April 15, 1999 ..... App. 98

APPENDIX F:
Amended Judgment in Favor of Patty Lamphiear, filed April 15, 1999 ..... App. 99

APPENDIX G:
Transcript of Trial Proceedings, dated March 22 through April 7, 1999 ..... App. 100

APPENDIX H:
Pre-Trial Order, filed March 19, 1999 ..... App. 165

APPENDIX I:
Transcript of Proceedings on Motions in Limine, dated March 12, 1999 ..... App. 170

APPENDIX J:
Ninth Circuit Order Denying Petition for Rehearing, dated August 8, 2002 ..... App. 180

TABLE OF AUTHORITIES

Page

CASES

Anheuser-Busch, Inc. v. Natural Beverage Distributors, 69 F.3d 337 (9th Cir. 1995) 16

Baylis v. Travelers' Ins. Co., 113 U.S. 316, 5 S.Ct. 494, 28 L.Ed. 989 (1885) 20

Bazemore v. Friday, 478 U.S. 385, 106 S.Ct. 3000, 92 L.Ed.2d 315 (1986) ..... *passim*

Bennett v. Roberts, 295 F.3d 687 (7th Cir. 2002) 26

Berger v. United States, 295 U.S. 78, 55 S.Ct. 629, 79 L.Ed. 1314 (1935) 18

Bickerstaff v. Vassar College, 196 F.3d 435 (2nd Cir. 1999) 23, 24, 28

Bird v. Glacier Elec. Coop., Inc., 255 F.3d 1136 (9th Cir. 2001) 14, 16

Brasfield v. U.S., 272 U.S. 448, 47 S.Ct. 135, 71 L.Ed. 345 (1926) 12

Bruno v. W.B. Saunders Co. & CBS, 882 F.2d 760 (3rd Cir. 1989) 26

Bullington v. United Air Lines, Inc., 186 F.3d 1301 (10th Cir. 1999) 26

County of Maricopa of State of Ariz. v. Maberry, 555 F.2d 207 (9th Cir. 1979) 17

Coward v. ADT Security Systems, Inc., 140 F.3d 271 (D.C. Cir. 1998) 22, 23

Curtis Pub. Co. v. Butts, 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed.2d 1094 (1967) 12

TABLE OF AUTHORITIES – Continued

Page

Daubert v. Merrel Dow Pharmaceuticals, Inc., 43 F.3d 1311 (9th Cir.), *cert. denied*, 516 U.S. 869, 116 S.Ct. 189, 133 L.Ed.2d 126 (1995).....29

Deppe v. Tripp, 863 F.2d 1356 (7th Cir. 1988).....14

Dougherty v. Waterman Steamship Corp., 265 F.2d 284 (3rd Cir. 1959).....18

Edwards v. Sears, 512 F.2d 276 (5th Cir. 1975).....18

EEOC v. Chicago Miniature Lamp Works, 947 F.2d 292 (7th Cir. 1991).....25

EEOC v. Sears Roebuck & Co., 839 F.2d 302 (7th Cir. 1988).....24

Furr v. SeaGate Tech., Inc., 82 F.3d 980 (10th Cir. 1996), *cert. denied*, 519 U.S. 1056, 117 S.Ct. 684, 136 L.Ed.2d 608 (1997).....26, 27

Greenway v. Buffalo Hilton Hotel, 143 F.3d 47 (2nd Cir. 1998).....13

Hemmings/Lamphiear v. Tidyman's, Inc., 65 F.Supp.2d 1157 (E.D. Wash. 1999), 285 F.3d 1174 (9th Cir. 2002).....1

Hodges v. Easton, 106 U.S. 408, 1 S.Ct. 307, 27 L.Ed. 169 (1882).....19

IGO v. Coachmen Industries, Inc., 938 F.2d 650 (6th Cir. 1991).....14

Johnson v. U.S., 520 U.S. 461, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997).....9

Jones v. U.S., 527 U.S. 373, 119 S.Ct. 2090, 144 L.Ed.2d 370 (1999).....9

Koger v. Reno, 98 F.3d 631 (D.C. Cir. 1996).....23

TABLE OF AUTHORITIES – Continued

Page

Kotteakos v. U.S., 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946) 9, 10, 11

Lyon v. Mutual Benefit Health & Accident Ass'n, 305 U.S. 484, 59 S.Ct. 297, 83 L.Ed. 303 (1939) 20

Maitland v. University of Minnesota, 155 F.3d 1013 (8th Cir. 1998) 26

McDonough Power Equipment, Inc. v. Greenwood, 464 U.S. 548, 104 S.Ct. 845, 78 L.Ed.2d 663 (1984) 20

McWhorter v. City of Birmingham, 906 F.2d 674 (11th Cir. 1990) 15

Minneapolis, St. Paul & Sault Ste. Marie Railway Co. v. Moquin, 283 U.S. 520, 51 S.Ct. 501, 75 L.Ed. 1243 (1931) 11, 12

Moses v. Union Pac. R.R., 64 F.3d 413 (8th Cir. 1995) 10, 14

Mozee v. American Commercial Marine Service Co., 940 F.2d 1036 (7th Cir. 1991), *cert. denied*, 506 U.S. 872, 113 S.Ct. 207, 121 L.Ed.2d 148 (1992) 26

Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 96 S.Ct. 2791, 49 L.Ed.2d 683 (1976) 20

New York Cent. R. Co. v. Johnson, 279 U.S. 310, 49 S.Ct. 300, 73 L.Ed. 706 (1929) 12, 18

O'Neal v. McAninich, 513 U.S. 432, 115 S.Ct. 992, 130 L.Ed.2d 947 (1995) 10, 11

Oxford Furniture Cos. v. Drexel Heritage Furnishings, Inc., 984 F.2d 1118 (11th Cir. 1993) 14

TABLE OF AUTHORITIES – Continued

Page

Penk v. Oregon State Bd. of Higher Education, 816 F.2d 458 (9th Cir.), *cert. denied*, 484 U.S. 853, 108 S.Ct. 158, 98 L.Ed.2d 113 (1987) 26

Rojas v. Richardson, 703 F.2d 186 (5th Cir. 1983) 13

Shokuwan Shimabukuro v. Higeyoshi Nagayama, 140 F.2d 13 (D.C. Cir. 1944) 15

Smith v. KMart Corp., 177 F.3d 19 (1st Cir. 1999) 12

Smith v. Virginia Commonwealth University, 84 F.3d 672 (4th Cir. 1996) 26

Snyder v. Ridenour, 889 F.2d 1363 (4th Cir. 1989) 13

Strickland v. Owens Corning, 142 F.3d 353 (6th Cir. 1998) 14

Thomure v. Truck Ins. Exchange, 781 F.2d 141 (8th Cir. 1986) 14

U.S. v. Atkinson, 297 U.S. 157, 56 S.Ct. 391, 80 L.Ed. 555 (1936) 9

U.S. v. Olano, 507 U.S. 725, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993) 9

U.S. v. Young, 470 U.S. 1, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985) 9

Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 109 S.Ct. 2115, 104 L.Ed.2d 733 (1989) 28

Webster v. Reid, 52 U.S. 437, 11 How. 437, 13 L.Ed. 761 (1850) 20

Wessmann v. Gittens, 160 F.3d 790 (1st Cir. 1998) 26

Whitehead v. Food Max of Mississippi, Inc., 163 F.3d 265 (5th Cir. 1998) 13

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTION

Sixth Amendment 20

Seventh Amendment 1, 8, 19, 21

Fourteenth Amendment 20

Title VII 25

STATUTES

28 U.S.C. §391 10

28 U.S.C. §1254 1

28 U.S.C. §1291 1

28 U.S.C. §2111 ..... 2, 10

RULES

FRCP 61 ..... 2, 9

FRCrP 52 2

FRCrP 52(a) 9

FRE 404(b) 18

S.Ct. Rule 29.6 ii

PETITION FOR A WRIT OF CERTIORARI

Tidyman's, Inc. ("Tidyman's") petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals (App. 1-72) is reported at 285 F.3d 1174 (9th Cir. 2002). The decisions of the district court (App. 73-89, 165-69) are reported at 65 F.Supp.2d 1157 (E.D. Wash. 1999).

JURISDICTION

The Ninth Circuit Court of Appeals' jurisdiction was based on 28 U.S.C. §1291. The Court of Appeals entered its judgment on April 11, 2002. The Court of Appeals entered its Order Denying Petition for Rehearing and the Suggestion for Rehearing En Banc on August 8, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. §1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Seventh Amendment to the Constitution of the United States of America provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in

any Court of the United States, than according to the rules of the common law.

28 U.S.C. §2111 provides:

On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.

Rule 61, Federal Rules of Civil Procedure provides:

No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

Rule 52, Federal Rules of Criminal Procedure provides:

(1) HARMLESS ERROR. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

(2) PLAIN ERROR. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

STATEMENT OF THE CASE

Connie Hemmings ("Hemmings") and Patty Lamphiear ("Lamphiear") sued their employer, Tidyman's, alleging discrimination on the basis of their sex in violation of federal and state law by failing to pay them equal wages, failing to promote them, and retaliating against them. Following a jury trial, the United States District Court for the Eastern District of Washington entered judgment for Hemmings and Lamphiear, and cross-appeals were taken.

Attorney Misconduct. At the pre-trial conference, the district court reserved ruling on Tidyman's motion in limine to exclude plaintiffs' anecdotal evidence regarding other employees' claims of discrimination against the company (App. 165, 171-72), and instead ordered trial counsel to anticipate contested evidentiary issues so as to allow the trial counsel to argue and the district court to rule outside the presence of the jury. (App. 170-72) In reserving on Tidyman's motion in limine, the district court ordered trial counsel to provide, in advance, a written outline description of testimony containing other employees' discrimination claims against Tidyman's. (App. 165, 171-72, 176-77)

During plaintiff Hemmings' direct testimony, the district court sustained defense counsel's objections to testimony that Tidyman's had been sued before. (App. 106) Nonetheless, plaintiffs' counsel continued their direct examination of Hemmings as to previous claims of discrimination by women and suits against Tidyman's. (App. 107) Plaintiffs' counsel blatantly disregarded the district court's pre-trial order, thereby not providing defense counsel with any prior notice of this testimony.

During plaintiffs' counsel's direct examination of a sympathetic witness, plaintiffs' counsel attempted to elicit testimony regarding a former Tidyman's employee who had brought suit against the company in 1994 represented by co-counsel. (App. 112) Plaintiffs' counsel dropped this line of questioning after defense counsel objected. (App. 112) Again, defense counsel was not provided with the required advance notice of this line of questioning.

Plaintiffs' counsel directly examined plaintiffs' expert witness eliciting testimony as to the expert's prior experience assisting plaintiffs' counsel in representing women bringing suit against Tidyman's. (App. 116) The district court sustained defense counsel's objection to this line of questioning with a stern warning "that is enough." (App. 117) Again, plaintiffs' counsel did not provide defense counsel with the required advance notice of this line of questioning, contrary to the district court's pre-trial order.

In closing argument, plaintiffs' counsel argued to the jury that a Tidyman's supervisor's disciplinary counseling session with Lamphiear was tantamount to "rape in the alley." (App. 161) Further, improper and inflammatory statements by plaintiffs' counsel includes calling into question a female paralegal at defense counsel table (App. 160); and describing a female member of Tidyman's Board of Directors as a "token woman." (App. 160)

At the end of the trial proceedings in rebuttal final argument, counsel for Hemmings and Lamphiear insinuated that it had been established and adjudicated in 1994 that Tidyman's employment practices had a disparate impact on women by stating as follows:

> They have not corrected any of these policies and they knew that they should because *this is not*

> *the first time they have been sued. I have sued them before in 1994, so they had subjective policies which had a disparate impact on all women, including plaintiffs, and that proves our case. . . .*

(App. 163-64) (emphasis added). Tidyman's did not object to this statement or any other statement made by counsel during closing arguments.

During post-trial arguments, the district court recognized that plaintiffs' counsel's remarks to the jury regarding prior litigation against Tidyman's were "totally improper" and recognized the district court's own failure to correct *sua sponte* the outrageous argument. (App. 95-96) The district court subsequently denied Tidyman's Motion for a New Trial. (App. 89)

On appeal, a three-judge panel from the Ninth Circuit split 2-1 in favor of upholding the district court's decision to deny Tidyman's a new trial on the basis of attorney misconduct. The Ninth Circuit panel majority concluded:

> We readily conclude that plaintiffs' counsel's statement during closing argument was error. Counsel inappropriately referred to other cases that she herself had litigated. The fact that she personally had litigated the cases had no relevance to the lawsuit. Nor should she have suggested that this litigation "proved the case." *We also find that the error was "plain."* Plaintiffs' remarks were *obviously improper and blatant* enough for the trial judge to recall them easily.

(App. 36) (emphasis added).

However, the majority of the panel went on to conclude that Tidyman's did not meet "The burden of making

a concrete showing of prejudice resulting from improper closing argument. . . . " (App. 36-40)

In his dissenting opinion, Judge Gould held:

> [B]ecause I view those statements [of counsel in rebuttal argument] as fundamental error that in context was *necessarily prejudicial*, I would give relief for the improper argument and hold that the district court abused its discretion in failing to grant defendant's motion for a new trial on the basis of those improper statements. . . .
>
> On this record, where discrimination was vigorously contested and much turned on characterizations and questions of degree, Tidyman's was *necessarily prejudiced* by the improper argument. . . .
>
> The majority glosses over the likely impact of the argument of previously excluded evidence. . . .
>
> Given the size of the jury verdict, it is probable that the jury took counsel's improper and unsubstantiated admonishments to heart. . . .

(App. 65-66, 69, 71) (emphasis added).

Statistical Expert Testimony. Prior to trial, Tidyman's moved to exclude plaintiff's statistical expert testimony because it was so fatally flawed that it lacked any probative value and would improperly prejudice the jury. (App. 100-02, 165, 173-76) The district court denied the motion and ruled that any flaws in the analysis could be addressed through cross-examination on impeachment. (App. 165, 173-76) At trial, plaintiffs' statistical expert Nyak Polissar ("Polissar") testified that he performed statistical analysis and testing on raw data comprised of employment histories of 307 persons from November 1, 1995, through

October 8, 1998, each member of Tidyman's corporate and store management. (App. 118-21, 124-25, 128) The raw data reviewed and analyzed by Polissar did not include data relating to each management employee's qualifications, level of education, preferences, and experience outside the company. (App. 128-38)

Polissar used the general Tidyman's management population as the proxy pool of "competent" job applicants for all Tidyman's management jobs. (App. 118-21, 124-25, 128) Consequently, Polissar assumed that each person was equally qualified and wanted every management job. (App. 123-25) Polissar assumed in making his statistical analysis that the individual managerial employees had the same qualifications and preferences. (App. 122-25, 128-38) On direct examination, Polissar testified:

> In this database that we have here, we have – *we don't have qualifications* or numerical quantity for qualifications of people, and *I think that the big thing that people would be looking for, say, qualifications of people in preferences.*

(App. 123) (emphasis added).

> *So I conclude that* there is evidence *that the qualifications cannot differ radically between men and women,* and from the plots and the averages that we see, *they seem to be somewhat similar.*

(App. 124) (emphasis added).

Consequently, Polissar was unable to quantitatively eliminate individual qualifications and preferences as factors causing the gender compositions and distributions he observed. (App. 123, 138, 140) Polissar could not scientifically conclude that gender was the cause of the job

and salary distributions at Tidyman's. (App. 126-28, 138-41) Because Polissar was not able to present a numerical quantity representing the probability as to which factor was causing the gender distributions and compositions, he could only fall back upon his own personal experiences to substantiate his opinions and conclusions that gender was the cause of the distributions and compositions in Tidyman's management. (App. 138-41)

On appeal, the Ninth Circuit affirmed the district court's denial of Tidyman's motion to exclude Dr. Polissar's analysis. In its holding, the Ninth Circuit recognized that "[i]n *Bazemore [v. Friday]*, the Supreme Court addressed the precise question presented by Tidyman's' appeal. . . . " the Ninth Circuit further held:

> We cannot say that the exclusion of preferences, individual qualifications, and education rendered the data set so incomplete "as to be irrelevant." *Bazemore*, 478 U.S. at 400.

(App. 26) The Ninth Circuit further held that Tidyman's did not prove at trial that any of these factors were important to the subjective and undefined promotion process or compensation awards. (App. 26)

REASONS FOR GRANTING THE WRIT

Set forth below are the substantial questions Tidyman's certiorari petition would present to this Court related to Tidyman's right to a fair jury trial under the Seventh Amendment, and the due process to which it is entitled.

1. The Ninth Circuit's Decision Conflicts with this Court's Precedents on the Plain-Error Doctrine.

The plain-error doctrine is recognized by the Supreme Court of the United States, although more developed on the criminal rather than the civil side. The plain-error doctrine addresses forfeited-but-reversible error. *U.S. v. Olano*, 507 U.S. 725, 732, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993).

> Under that test, before an appellate court can correct an error not raised at trial, there must be (1) "error," (2) that is "plain," and (3) that "affect[s] substantial rights." [internal citations omitted]. If all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error "'"seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings."'" *U.S. v. Olano*, 507 U.S. 725 at 732, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993) (quoting *U.S. v. Young*, 470 U.S. 1, 15, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985), in turn quoting *U.S. v. Atkinson*, 297 U.S. 157, 160, 56 S.Ct. 391, 80 L.Ed. 555 (1936)).

Johnson v. U.S., 520 U.S. 461, 466-67, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997). *See also Jones v. U.S.*, 527 U.S. 373, 389, 119 S.Ct. 2090, 144 L.Ed.2d 370 (1999).

Precedent indicates that the civil and criminal plain error doctrines do not differ. Both the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure contain "harmless error" sections. *Kotteakos v. U.S.*, 328 U.S. 750, 757, n.9, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946). The current harmless error sections of Fed.Crim.R.Pro. 52(a) and Fed.Civ.R.Pro. 61 refer to the

original harmless error statute 28 U.S.C. §391, now codified with minor changes at 28 U.S.C. §2111, as their statutory source. *O'Neal v. McAninich*, 513 U.S. 432, 441, 115 S.Ct. 992, 130 L.Ed.2d 947 (1995). The Ninth Circuit Court of Appeals used a similar test to determine whether Tidyman's was entitled to relief under the plain-error doctrine for counsel misconduct during rebuttal argument.

> Plain-error review requires: (1) an error, (2) the error is plain or obvious, (3) the error was prejudicial or effects substantial rights, and (4) review is necessary to prevent a miscarriage of justice.

(App. 36)

The focus of attention by the majority of the panel was whether the error of counsel's misconduct was prejudicial. The majority relied upon *Moses v. Union Pac. R.R.*, 64 F.3d 413, 418 (8th Cir. 1995) for the proposition that "[T]he burden of making a 'concrete showing of prejudice' resulting from improper closing argument falls upon the appellant." (App. 36) The majority's decision to deny relief to Tidyman's was based upon its holding that the misconduct was "isolated." (App. 37) The majority further held: "[i]n the absence of counsel's improper statements, we cannot say that we think a different verdict was likely." (App. 40)

The majority applied an erroneous – and much too rigorous – standard for review as to whether the plain error affected Tidyman's substantial rights. The majority should not have demanded a "concrete showing of prejudice." Rather, the majority should have applied a standard asking whether "it [is] highly probable that the error had a substantial and injurious effect or influence in determining the jury's verdict." *Kotteakos v. U.S.*, 328 U.S. at 776.

> If, when all is said and done, the conviction is sure that the error did not influence the jury, or had very slight effect, the verdict and the judgment should stand. . . . But, if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. *The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if someone is left in grave doubt, the conviction cannot stand.*

Id., 328 U.S. at 764-65 (emphasis added). *See also O'Neal v. McAninich*, 513 U.S. at 437-38.

This standard for determining plain error in criminal cases is consistent with this Court's prior holdings reviewing appeals to passion and prejudice to juries in civil cases in the absence of an objection from counsel. In *Minneapolis, St. Paul & Sault Ste. Marie Railway Co. v. Moquin*, 283 U.S. 520, 51 S.Ct. 501, 75 L.Ed. 1243 (1931), the Court held:

> In actions under the federal statute, no verdict can be permitted to stand which is found to be in any degree the result of appeals to passion and prejudice. Obviously such means may be quite as effective to beget a wholly wrong verdict as to produce an excessive one. A litigant gaining a verdict thereby will not be permitted the benefit of calculation, which can be little better than speculation, as to the extent of the wrong inflicted upon his opponent.

Id., 283 U.S. at 521-22. In *New York Cent. R. Co. v. Johnson*, 279 U.S. 310, 49 S.Ct. 300, 73 L.Ed. 706 (1929), the Court held:

> Respondents urge that the objections were not sufficiently specific to justify a reversal. But a trial in court is never, as respondents in their brief argue this one was, "purely a private controversy * * * of no importance to the public." The state, whose interest it is the duty of court and counsel alike to uphold, is concerned that every litigation be fairly and impartially conducted and that verdicts of juries be rendered only on the issues made by the pleadings and the evidence. *The public interest requires that the court of its own motion, as is its power and duty, protect suitors in their right to a verdict, uninfluenced by the appeals of counsel to passion or prejudice.* (internal citations omitted). Where such paramount considerations are involved, the *failure of counsel to particularize an exception will not preclude this court from correcting the error.*

Id., 279 U.S. at 318-19 (emphasis added) (citing *Brasfield v. U.S.*, 272 U.S. 448, 450, 47 S.Ct. 135 (71 L.Ed. 345 (1926)). *See also Curtis Pub. Co. v. Butts*, 388 U.S. 130, 160, 87 S.Ct. 1975, 18 L.Ed.2d 1094 (1967) ("[T]he general rule [is] that a verdict based on jury prejudice cannot be sustained *even when punitive damages are warranted.*") (emphasis added).

While most federal courts of appeals have adopted and applied the plain error doctrine when reviewing closing arguments in civil cases, none (other than the Ninth Circuit in the instant case) has adopted a "concrete showing of prejudice" standard in cases of determining plain error. *See Smith v. KMart Corp.*, 177 F.3d 19, 26 (1st Cir.

1999) ("plain error is a 'rare species in civil litigation,' encompassing only those errors which reach the 'pinnacle of fault'. . . . "); *Greenway v. Buffalo Hilton Hotel*, 143 F.3d 47, 51 (2nd Cir. 1998) ("only where an unpreserved 'error [is] so serious and flagrant that it goes to the very integrity of the trial' will a new civil trial be warranted.") (alteration in original); *Snyder v. Ridenour*, 889 F.2d 1363, 1366 (4th Cir. 1989) ("However, such error must be so serious and flagrant that it goes to the very integrity of the trial").

The Fifth Circuit Court of Appeals has come closest to setting a clear standard for determining plain error.

> We have defined plain error as error which is "both *obvious* and *substantial*." (internal citations omitted) But such elegant phraseology yields little guidance. The determination will rest ultimately on the facts of each case.

Rojas v. Richardson, 703 F.2d 186, 190 (5th Cir. 1983) (emphasis added).

> [I]f you throw a skunk into the jury box, you can't instruct the jury not to smell it. Some references are so prejudicial that it is difficult for curative instructions to resuscitate fairness.

Id., at 192 (internal citations omitted). *See also Whitehead v. Food Max of Mississippi, Inc.*, 163 F.3d 265, 278 (5th Cir. 1998) (substantial injustice would result by affirming awards which indicate by their size that they were influenced by passion and prejudice).

Although the Sixth Circuit has not used the terms "plain" or "fundamental" error, it recognized that the

doctrine allows for an appellate court to review "outrageous conduct" of counsel during the course of the trial – including closing arguments – despite the lack of objection. *See IGO v. Coachmen Industries, Inc.*, 938 F.2d 650, 652-54 (6th Cir. 1991). *See also Strickland v. Owens Corning*, 142 F.3d 353 (6th Cir. 1998).

The Seventh Circuit stands alone in its failure to recognize plain or fundamental error in civil cases providing an apparent strict bar to appellate review of alleged error in argument absent objection. *Deppe v. Tripp*, 863 F.2d 1356 (7th Cir. 1988).

In *Moses*, the Eighth Circuit was reviewing the trial court's decision not to sustain an objection to improper argument on the basis of reversible error – not plain error. *Moses v. Union Pacific R.R.*, 64 F.3d 413, 417 (8th Cir. 1995). *See Thomure v. Truck Ins. Exchange*, 781 F.2d 141, 143 (8th Cir. 1986) (plain error is error "so prejudicial as to cause a miscarriage of justice").

The instant Ninth Circuit majority's opinion conflicts with a prior Ninth Circuit decision.

> We will review for plain or fundamental error, absent a contemporaneous objection or motion for a new trial before a jury has rendered its verdict, where the integrity or fundamental fairness of the proceedings in the trial court is *called into serious question.*

Bird v. Glacier Elec. Coop., Inc., 255 F.3d 1136, 1148 (9th Cir. 2001) (emphasis added).

The Eleventh Circuit in *Oxford Furniture Cos. v. Drexel Heritage Furnishings, Inc.*, 984 F.2d 1118, 1128 (11th Cir. 1993) held: "[W]hen the interests of substantial

justice are at stake, we may order a new trial." *See also McWhorter v. City of Birmingham*, 906 F.2d 674 (11th Cir. 1990):

> These improper arguments also *likely* affected the jury's verdict. . . . Defense counsel's failure to object to the improper argument, although troublesome, is not fatal to [the] case. . . . We also recognize that curative instructions do not always eradicate the prejudice resulting from an improper argument.

Id., 906 F.2d at 677-78 (emphasis added).

Although the District of Columbia Circuit Court of Appeals has not addressed the plain error doctrine in the context of improper argument, it has recognized the power of the court to review error absent an objection when a "miscarraige of justice" may occur. *See Shokuwan Shimabukuro v. Higeyoshi Nagayama*, 140 F.2d 13, 15 (D.C. Cir. 1944).

The nature of the misconduct in this case was grossly prejudicial and it is highly probable that the error had a substantial and injurious effect or influence in determining the jury's verdict. First, the misconduct was not "isolated." It is important to examine the climate in which the improper argument occurred. Two counsel for Hemmings and Lamphiear participated in closing argument. The first made statements to the jury comparing a disciplinary meeting with Lamphiear as a "rape in the alley," suggested that a female Board Member on Tidyman's Board of Directors was a token woman, and insinuated that defendant's counsel had a female paralegal seated at counsel's trial table to give the impression of being fair to women. This created an atmosphere of hostility against

the defendant with the clear aim to raise prejudice and inflame the jury. (App. 160-61)

The misconduct was part of a constant effort during the trial to deliberately and repeatedly attempt to place prejudicial information in front of the jury. (App. 105-07, 112-13, 116-17) Tidyman's objections to these persistent efforts to permeate the proceedings with highly prejudicial, extraneous matters were sustained on three occasions. (App. 105-06, 112-13, 116-17) Counsel's improper statements in rebuttal arguments were made after the district court sustained Tidyman's third objection with a stern warning "that is enough." (App. 117) These calculated attempts to inject extraneous and inadmissible matters before the jury were done without warning so as to place Tidyman's in the untenable situation it sought to avoid in bringing its motion in limine. (App. 165, 176-77)

> Where misconduct permeates the proceeding, the jury is "necessarily prejudiced." "[C]onstant objections are certainly not required, as they could antagonize the jury. . . . "

Anheuser-Busch, Inc. v. Natural Beverage Distributors, 69 F.3d 337, 346 (9th Cir. 1995) (internal citations omitted).

A single remark in argument can sufficiently permeate the proceedings to justify a new trial.

> For conduct to "permeate" a proceeding it need not occur throughout the proceeding. Were that the case, the most blatant, unjustified, and prejudicial misconduct in closing argument would never warrant reversal because it would have occurred only at the end of a trial.

Bird v. Glacier Elec. Coop., Inc., 255 F.3d at 1145 n.16. It is clear that counsel's blatant and unjustified misconduct in

rebuttal argument so permeated the trial that the jury was "necessarily prejudiced."

Second, counsel testified before the jury that she had personally litigated the same type of cases against Tidyman's. This was not true and is unduly prejudicial because the danger is that as an officer of the court the jury attributes increased credibility to her statements. It is "impossible" to fairly conclude that the jury is not influenced when counsel testifies to something not within the record. *County of Maricopa of State of Ariz. v. Maberry*, 555 F.2d 207, 219 (9th Cir. 1979). Here, plaintiffs' counsel inserted her own alleged personal knowledge of facts not in evidence "that proves our case" of discrimination against women. "The tactic of counsel to add in argument what was not admitted in testimony is fundamental error that cannot be countenanced." *Dissent Op.* n.3 (App. 68) The improper argument was so serious and flagrant that it is impossible to conclude that it did not go to the very integrity of the trial.

Third, the improper argument went to the very central issue of the controversy. The improper comments were an egregious attack into the heart of Tidyman's' case. Counsel's improper argument left the indelible and *false* impression upon the jury that other women had sued Tidyman's and established in court that Tidyman's' policies discriminated against all women. Nothing of this nature was introduced into evidence. This left the distinct impression upon the jury that Tidyman's had a hardened and long history of discriminating against women. Such improper testimony brings the credibility of all of Tidyman's' witnesses into sharp focus, thereby, highlighting the significance of the resulting prejudice.

> A particularly indefensible tactic [is] the use of the closing argument to bring before the jury damaging facts not in evidence and never established.

Edwards v. Sears, 512 F.2d 276, 284 (5th Cir. 1975). "[T]o add in argument what was not admitted in testimony *is* a fundamental error that cannot be countenanced." *Dissent Op.* n.3 (App. 68) (emphasis added).

The improper argument was indecorous and cannot be fairly concluded as inconsequential.

> In appraising the instances of alleged error presented by appellant, we are equally aware that *prejudice may be so highly probable* as a result of improper conduct of counsel that its *nonexistence cannot justifiably be assumed.*

Dougherty v. Waterman Steamship Corp., 265 F.2d 284, 286 (3rd Cir. 1959) (emphasis added) (citing *Berger v. United States*, 295 U.S. 78, 55 S.Ct. 629, 79 L.Ed. 1314 (1935); *New York Cent. R. Co. v. Johnson*, 279 U.S. 310, 49 S.Ct. 300, 73 L.Ed. 706 (1929)).

Fourth, counsel's improper statements were made *in rebuttal arguments*. These were virtually the last words the jury heard before its deliberations. The judge had excluded the evidence and it was not admitted. The tactic of counsel was clear: to create the allusion that Tidyman's had acted in conformity with alleged prior bad acts which led to a finding of discrimination in another lawsuit. This was an obvious attempt to introduce highly prejudicial information before defense counsel could raise a Rule 404(b) objection. Had this information been properly presented in plaintiffs' case-in-chief, Tidyman's would have answered with evidence. It may have been presented

to the jury with a limiting instruction. Counter arguments may have been fashioned by Tidyman's. This unadmitted evidence slipped into rebuttal closing argument denied Tidyman's of a fair trial and the due process to which it is entitled. *Dissent Op.* (App. 69) Due process guarantees every litigant the right to an impartial jury to decide the controversy based solely upon the evidence admitted at trial. A denial of the right to an impartial jury verdict is a substantial or injurious impact upon a litigant's substantial rights.

In his dissenting opinion, Judge Gould applied the correct standard in determining plain error and reached the correct result: "The majority glosses over the *likely* impact of the argument of previously excluded evidence." *Dissent Op.* (App. 69) (emphasis added).

> No evidence of similar scope had been admitted in the case-in-chief. Given the size of the jury verdict, *it is probable* that the jury took counsel's improper and unsubstantiated admonishments to heart. I must respectfully dissent from the majority's conclusion to the contrary.

Dissent Op. (App. 71-72) (emphasis added). "Tidyman's was *necessarily prejudiced* by the improper argument." *Dissent Op.* (App. 69) (emphasis added).

Moreover, the right to a fair trial by an impartial jury in civil cases is a substantial right protected by the Seventh Amendment. *Hodges v. Easton*, 106 U.S. 408, 412, 1 S.Ct. 307, 27 L.Ed. 169 (1882) ("It has been often said by this court that the trial by jury is a fundamental guaranty of the rights and liberties of the people.") This Court has also stated that the right of a trial by jury guaranteed by the Seventh Amendment has always been guarded by the

courts with jealousy. *Baylis v. Traveler's Ins. Co.*, 113 U.S. 316, 321, 5 S.Ct. 494, 28 L.Ed. 989 (1885). *See also Lyon v. Mutual Benefit Health & Accident Ass'n*, 305 U.S. 484, 492, 59 S.Ct. 297, 83 L.Ed. 303 (1939) ("It is essential that the right to trial by jury be scrupulously safeguarded. . . . "); *Webster v. Reid*, 52 U.S. 437, 454, 11 How. 437, 13 L.Ed. 761 (1850) ("[F]or whatever jeopardizes for a moment the integrity of the trial by jury ought to be strictly scrutinized and condemned.") It is abundantly clear that the fairness in a jury trial, whether criminal or civil in nature, is a vital constitutional right. This necessarily includes the right to a trial by a panel of impartial jurors.

> The right to a jury trial . . . is essentially the right to a "fair trial by a panel of impartial, 'indifferent' jurors," (internal citation omitted) jurors who are "'indifferent as (they) stand unsworn.'"

Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 585-86, 96 S.Ct. 2791, 49 L.Ed.2d 683 (1976) (discussing the Sixth Amendment applicable to the States through the Due Process Clause of the Fourteenth Amendment) (citations omitted). *See also McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548, 554, 104 S.Ct. 845, 78 L.Ed.2d 663 (1984) ("One touchstone of a fair trial is an impartial trier of the fact – 'a jury capable and willing to decide the case solely on the evidence before it.'") (internal quotes omitted).

The misconduct by counsel in this case was of a serious and flagrant nature. The obvious intent of counsel was to unduly prejudice the jury against Tidyman's with matters not admitted into evidence. This deprived Tidyman's of its right to a fair trial by an impartial jury

guaranteed by the Seventh Amendment, and due process. It is impossible to conclude that Tidyman's substantial rights were not affected. The error had a substantial influence on the jury's verdict, or at the very least, one is left in grave doubt that the judgment was not substantially swayed by the error. There is an important need for this Court to bring resolution to the conflicts created by the Ninth Circuit in this case, and to protect the integrity of judicial proceedings.

2. The Ninth Circuit's Decision Conflicts with the Court's Decision in *Bazemore v. Friday* and the Decisions of Other Federal Courts of Appeal on the Admissibility of Statistical Evidence in Employment Discrimination Cases.

The Ninth Circuit correctly concluded that "[i]n *Bazemore*, the Supreme Court addressed the precise question presented by Tidyman's' appeal. . . . " (App. 24) However, the Ninth Circuit improperly applied *Bazemore*. This Court has held that a regression analysis need not include *all* measurable variables to be acceptable evidence of discrimination *if* it accounts for the "major factors." *Bazemore v. Friday*, 478 U.S. 385, 400, 106 S.Ct. 3000, 92 L.Ed.2d 315 (1986).

> While the omission of variables from a regression analysis may render the analysis less probative than it otherwise might be, it can hardly be said, absent some other infirmity, that *an analysis which accounts for the major factors* must be considered unacceptable as evidence of discrimination. *Normally,* failure to include variables will affect the analysis' probativeness, not its admissibility.

Id., 478 U.S. at 400 (internal quotes omitted) (emphasis added). The Ninth Circuit's decision in this case ignores the central premise in *Bazemore*: omission of "major factors" in any regression analysis must be considered unacceptable as evidence of discrimination. *Id.* "There may, of course, be some regressions so incomplete as to be inadmissible as irrelevant; . . . " *Id.*, 478 U.S. at 400, n.10.

Other federal courts of appeals have properly applied *Bazemore* and their holdings conflict with the Ninth Circuit's decision in this case. In a case strikingly similar to the instant case, in *Coward v. ADT Security Systems, Inc.*, 140 F.3d 271 (D.C. Cir. 1998), a plaintiff alleged intentional wage discrimination based on race relying upon multiple regression analysis comparing salaries of minority and non-minority employees throughout the company. The plaintiff's multiple regression analysis controlled only for race and seniority. *Id.*, 140 F.3d at 274. The regression analysis failed to account for education and prior work experience, and the district court excluded it from consideration in its decision to grant summary judgment for the employer. *Id.* The District of Columbia Court of Appeals affirmed the decision and held:

> The regression analysis failed to account for job title or any other variable representing type of work performed. This omission is fatal because [the plaintiffs] claim that they should be compared to employees in other job categories who perform similar work but who earn more money than they. According to their own theory of the case, therefore, job title, or some other measure of type of work, serves as a "major factor" within the meaning of *Bazemore*. But because the regression analysis compares *all* employees in *all* job categories without accounting for type of

> work, it tells us nothing about whether employees who perform similar work are paid differently. [The plaintiffs] therefore cannot use the regression analysis to show that similarly situated white employees earn more. Since the regression analysis is flawed as a matter of law, we need not decide whether the reason given by the district court – the omission of education and prior experience variables – would independently have invalidated the analysis.

Id., at 274-75 (emphasis in original). *See also Koger v. Reno*, 98 F.3d 631, 637 (D.C. Cir. 1996) ("Courts have not, however, understood *Bazemore* to require acceptance of regressions from which clearly major variables have been omitted – such as education and prior work experience. . . . ").

In another similar case, *Bickerstaff v. Vassar College*, 196 F.3d 435 (2nd Cir. 1999), the district court dismissed at summary judgment an associate professor's claim that her college discriminated against her on the basis of race and gender in failing to promote her. The Second Circuit affirmed the district court's holding that the professor's statistical analysis did not raise an inference of discrimination because it failed to control for two of the major variables in the promotion decision: teaching and service. *Id.*, at 448-49. The Second Circuit further held:

> The critical distinction that [the plaintiff] misses, however, is that in the present case, the district court did not reject [the plaintiff's expert's] regression analysis because it included less than all the relevant variables; rather, it found the evidence not probative because it omitted the major variables. *See*, e.g., *Koger v. Reno*, 98 F.3d at 637. Thus, as we explain below, [the plaintiff's

> expert's] statistical analysis falls within the *Bazemore* exception – that "[t]here may . . . be some regressions so incomplete as to be inadmissible as irrelevant." *Bazemore*, 478 U.S. at 400 n.10.

Bickerstaff v. Vassar College, 196 F.3d at 449.

In *EEOC v. Sears Roebuck & Co.*, 839 F.2d 302 (7th Cir. 1988), the EEOC brought a sex discrimination suit against the employer. After a bench trial, the district court entered judgment in favor of the employer after finding it could give little weight to the EEOC's regression analysis which included six factors believed to affect an applicant's chance of being hired, but not including "the most critical factor, the applicant's interest in commission sales and in the product to be sold, together with differences in qualifications." *Id.*, at 326. In affirming the district court's judgment, the Seventh Circuit held:

> It is clear from the district court's opinion that it did not determine that the EEOC's analyses were inadmissible or irrelevant because of the failure to include variables – instead, the court determined that the analyses were not probative because of the omissions. *Although we do not believe the court found the regression analyses totally unacceptable, the court's criticisms of the analyses are so pervasive that the court may have believed that the regressions were what the Bazemore Court termed "so incomplete as to be inadmissible as irrelevant," which would be an exception to the general rule established in Bazemore. Bazemore*, 478 U.S. at 400 n.10.

Id., at 327 (emphasis added).

In another Seventh Circuit case, *EEOC v. Chicago Miniature Lamp Works*, 947 F.2d 292 (7th Cir. 1991), the court came to a similar conclusion. The EEOC brought suit against the employer alleging race-based employment discrimination in Chicago. The employer manufacturer was located in a largely Hispanic and Asian neighborhood on the north side of Chicago. The employer's principal method of obtaining new entry-level workers was almost exclusively "word-of-mouth." After a bench trial, the district court found that the employer's reliance on word-of-mouth for filling entry-level jobs resulted in the exclusion of blacks from the network of information concerning jobs at the employer. In reaching its conclusion, the district court relied almost exclusively on the statistics presented by the EEOC's expert. *Id.*, at 295. The EEOC's statistics did not include the following considerations: relative commuting distance, shift preference, and lack of an English fluency requirement. *Id.*, at 300-01. In reversing the judgment below, the Seventh Circuit relied upon *Bazemore* and held:

> The missing neutral variables of relative commuting distance and language fluency requirements are too important to be ignored in this case. Our analysis of the judge's findings leaves us with the definite and firm conviction that a mistake has been committed. (internal citations omitted) Thus, we hold that the district court clearly erred in crediting statistical evidence outlined above as proof of disparate treatment under Title VII.
>
> In this case, the underlying hypothesis is faulty because considerations of applicant preference were totally ignored.

Id., at 301.

Other federal courts of appeal have recognized that *Bazemore* anticipated this type of problem and requires plaintiffs' analysis to take into account the major variables one might expect to cause a statistical disparity. *Mozee v. American Commercial Marine Service Co.*, 940 F.2d 1036, 1047 (7th Cir. 1991), *cert. denied*, 506 U.S. 872, 113 S.Ct. 207, 121 L.Ed.2d 148 (1992). *See also Bennett v. Roberts*, 295 F.3d 687, 697 (7th Cir. 2002) (exclusion of the "*crucial* factor of properly identifying the relevant labor market was fatal to plaintiff's statistical analysis") (emphasis added) (citing *Bazemore v. Friday*, 478 U.S. at 400); *Wessmann v. Gittens*, 160 F.3d 790, 805 n.8 (1st Cir. 1998); *Bruno v. W.B. Saunders Co. & CBS*, 882 F.2d 760, 767 (3rd Cir. 1989) ("the usefulness of statistics will depend primarily upon their relevance to the specific decision affecting the individual plaintiff."); *Smith v. Virginia Commonwealth University*, 84 F.3d 672, 676 (4th Cir. 1996) ("*Bazemore* and common sense require that any multiple regression analysis used to determine pay disparity must include all the *major* factors on which pay is determined.") (emphasis in original); *Maitland v. University of Minnesota*, 155 F.3d 1013, 1017 n.4 (8th Cir. 1998); *Penk v. Oregon State Bd. of Higher Education*, 816 F.2d 458, 465 (9th Cir.), *cert. denied*, 484 U.S. 853, 108 S.Ct. 158, 98 L.Ed.2d 113 (1987) ("*Bazemore*, however, does not give blanket approval to the introduction of all evidence derived from multiple regression analysis."); *Bullington v. United Air Lines, Inc.*, 186 F.3d 1301, 1313 n.8 (10th Cir. 1999).

"While statistical evidence may create an inference of discrimination, the evidence may be so flawed as to render it insufficient to raise a jury question." *Furr v. SeaGate Tech., Inc.*, 82 F.3d 980, 986 (10th Cir. 1996), *cert. denied*,

519 U.S. 1056, 117 S.Ct. 684, 136 L.Ed.2d 608 (1997). In *Furr*, the Tenth Circuit further noted the following relating to the probative value of statistical evidence in discrimination cases:

> In this case, Plaintiffs' statistical evidence is so flawed because it failed to compare similarly situated individuals. Plaintiffs' statistics grouped all employees together regardless of specialty or skill and failed to take into account nondiscriminatory reasons for the numerical disparities. "A plaintiff's statistical evidence must focus on eliminating non-discriminatory explanations for the disparate treatment by showing disparate treatment between *comparable* individuals." (internal quotes omitted.)

Id., at 986-87 (emphasis in original).

Throughout a three-week trial Tidyman's vigorously showed that individual's qualifications, preferences, and education were important in the promotion and compensation process. The record is replete with the individual qualifications considered in the decisions to fill promotions Hemmings and Lamphiear desired. (App. 148-50, 152-57) The record shows how qualifications, education, and labor market factors were included in compensation decisions affecting Hemmings and Lamphiear. (App. 109-12, 142-46) Common sense requires that education, qualifications, and preferences be included as *major factors* in any regression analysis used to determine pay and promotion disparities. There simply is no basis to support the Ninth Circuit's holding that Tidyman's did not show that the factors absent in Polissar's analysis were actually important to its promotions and compensation. (App. 26) The lack of formal

job descriptions cannot support such a sweeping statement. Polissar's statistical analysis makes *no effort* to account for nondiscriminatory explanations for the disparities he identifies. It is, therefore, fatally flawed as a matter of law. There is nothing in the record to suggest or show that Polissar had incomplete background information on Tidyman's management workforce, or that Tidyman's did not comply in good faith in the extensive discovery in this case.

Polissar did not review and analyze data relating to each management employee's qualifications, level of education, preferences and experience outside the company. Polissar assumed that all of the individual managerial employees had the same education, qualifications, and preferences. (App. 123-25, 128-38) Therefore, Polissar was unable to qualitatively eliminate education, individual qualifications, and preferences as factors causing gender compositions and distributions he observed. (App. 123, 138, 140) Polissar assumed every individual member of the management team at Tidyman's was equally educated, qualified, and desired every management job at Tidyman's. (App. 123-25, 128-38)

> [W]ithout a showing of causation between the challenged practice and the alleged disparities, employers would be potentially liable for the myriad of innocent causes that may lead to statistical imbalances in the composition of their work forces.

Bickerstaff v. Vassar College, 196 F.3d at 449 (quoting *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 109 S.Ct. 2115, 104 L.Ed.2d 733 (1989).

The Ninth Circuit incorrectly applied *Bazemore* by not first determining whether Polissar's analysis met the *minimal standards* for purposes of admissibility. Here, the pertinent inquiry is causation. Polissar could not account for the "major factors" in his regression analysis, and therefore he had to improperly fall upon his own personal experience to substantiate his opinions. Personal opinion by an expert witness without an understandable scientific basis is not science; it's personal opinion testifying. *Daubert v. Merrel Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1319 (9th Cir.), *cert. denied*, 516 U.S. 869, 116 S.Ct. 189, 133 L.Ed.2d 126 (1995).

There is an important need for this Court to bring resolution to the conflicts created by the Ninth Circuit in this case, and to protect the reliability of evidence in judicial proceedings.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

RESPECTFULLY SUBMITTED this 6th day of November, 2002.

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Volume 1 of 2

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CONNIE HEMMINGS AND PATTY LAMPHIEAR, *Plaintiffs-Appellees,* v. TIDYMAN'S INC., a Washington Corporation, *Defendant-Appellant.*	No. 99-35932 D.C. No. CV-97-00068-WFN
CONNIE HEMMINGS AND PATTY LAMPHIEAR, *Plaintiffs-Appellants,* v. TIDYMAN'S INC., a Washington Corporation, *Defendant-Appellee.*	No. 99-35984 D.C. No. CV-97-00068-WFN OPINION

Appeal from the United States District Court
for the Eastern District of Washington
Wm. Fremming Nielson, Chief District Judge, Presiding

Argued and Submitted
March 5, 2001 – Seattle, Washington

Filed April 11, 2002

Before: Harry Pregerson, Sidney R. Thomas, and
Ronald M. Gould, Circuit Judges.

Harry Pregerson, Circuit Judge, delivered the opinion of the Court as to Parts I, II, III, IV, V, VI, and VII, in which

Sidney R. Thomas, Circuit Judge, joined. Judge Thomas delivered the opinion of the Court as to Parts VIII and IX. Judge Pregerson joined as to Part VIII and dissents specially from Part IX. Ronald M. Gould, Circuit Judge joined as to Parts I, II, III, IVA, IVB, V, VI, VII, VIII and IX and filed a dissenting opinion as to Part IVC.

COUNSEL

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James Michael Kalamon, Paine, Hamblen, Coffin, Brooke & Miller, Spokane, Washington, for the defendant-appellant-cross-appellee.

OPINION

PREGERSON, Circuit Judge:

This appeal arises out of a jury verdict in favor of two women who sued their employer for sex discrimination. The women, Connie Hemmings ("Hemmings") and Patty Lamphiear ("Lamphiear"), charged their employer, Tidyman's Inc. ("Tidyman's"), with discriminating against them on the basis of their sex in violation of federal and state anti-discrimination laws by failing to pay them wages and compensation equal to their male counterparts, failing to promote them, and retaliating against them after they complained of the discrimination.

Tidyman's appeals the jury verdict and damages award in favor of the plaintiffs on four grounds. First,

Tidyman's contends that the district court erred at trial by admitting into evidence improper statistical expert testimony. Second, Tidyman's argues that the district court abused its discretion by denying Tidyman's' motion for a new trial on the grounds that the evidence was insufficient, that misconduct by the plaintiffs' counsel permeated the trial and prejudiced the jury, and that the size of the jury verdict was excessive. Third, Tidyman's challenges the district court's ruling that the plaintiffs could seek "double damages" under a Washington state law that provides for the doubling of any wages willfully and intentionally withheld from employees. *See* RCW §§ 49.52.050, 49.52.070. Tidyman's argues that the district court erred by not applying the Title VII cap on compensatory damages to the plaintiffs' damage awards for future losses and for violations of Washington state law. Finally, Tidyman's argues that the Washington state law is intended to cover only accrued wages that are not paid, rather than wages not paid because the employer paid a lower wage as a result of discrimination.

Hemmings and Lamphiear cross-appeal on the issue of punitive damages. After the jury awarded the plaintiffs punitive damages, the district court granted Tidyman's' renewed motion for judgment as a matter of law on the basis that the evidence did not support punitive damages. The plaintiffs contend that the district court erred as a matter of law by applying the wrong standard to determine whether the evidence supported the punitive damages awards. The plaintiffs ask that we reinstate the punitive damages awards in full, arguing that we should not apply the Title VII damages cap to these awards because it is unconstitutional. Finally, the plaintiffs argue

that the district court erred by excluding costs for depositions and the preparation of certain affidavits from the attorney fees award.

We have jurisdiction under 28 U.S.C. § 1291. We reverse the district court's determination that the plaintiffs were not entitled to punitive damages, and we reverse the award of double damages under the Washington state statute. In all other respects, we affirm the district court. We conclude that Title VII's cap on punitive damages is constitutional, direct the district court to reinstate the jury's punitive damages award, and apply the Title VII cap to the punitive damages.

I.

Factual Background

A. Connie Hemmings.

In 1973, Connie Hemmings began working in the Billings, Montana office of Tidyman's, a chain of grocery stores in the Pacific Northwest. She started as an accounts payable clerk in the bookkeeping department, and was promoted to officer [sic] manager. In 1986, the Billings office closed, and Tidyman's transferred its corporate headquarters to Spokane, Washington. Hemmings moved with her family to Spokane to work in the new office because of the opportunities it offered her for career advancement.

Hemmings was promoted to controller in 1987, replacing Mike Davis, who became the Chief Financial Officer ("CFO") and Hemmings' direct supervisor. Davis consistently gave Hemmings outstanding job performance evaluations. Hemmings decided to go back to college during this period to enhance her career potential. She

obtained her bachelor degree in business management and graduated with honors.

Hemmings oversaw a number of employees as part of her job. Hemmings was concerned about the lack of women in management positions at Tidyman's and what she perceived as roadblocks to their promotions. Hemmings initiated conversations about this topic with various executives and managers of Tidyman's, including Jack Heuston, the President.[1] Heuston laughed at the suggestion that more women should be in management and told Hemmings that women in management would "need to lift 50 pounds of potatoes."

In May of 1996, Hemming's supervisor, Davis, was promoted to Chief Operating Officer and the CFO position opened. Trial witnesses testified that Hemmings was well-qualified for the CFO position. She had experience overseeing financial statement reporting, supervising staff, working with internal audits, and working with banks and third-party administrators.

Hemmings was interviewed for the position along with another woman and one man. This was the first time Tidyman's used an interview process to hire for an upper management position; previously, job openings were not posted and individuals were merely informed that they received the promotion. An all-male hiring committee interviewed Hemmings. The hiring committee concluded that Hemmings demonstrated poor presentation skills

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[1] Hemmings also discussed with Jim Armstrong, the director of risk management, the need to hire more women in management to avoid liability in future lawsuits.

during her interview, and hired the male candidate, Lee Clark. Davis told Hemmings that she was not hired because the board "did not want to work with an emotional woman."

On July 1, 1996, Hemmings and the other plaintiff, Patty Lamphiear, served Tidyman's with a demand letter outlining their claims of discrimination. Hemmings testified that the new CEO, John Maxwell, intimidated and harassed her in response to the demand letter, and attempted to discuss the possible lawsuit against Tidyman's in the absence of her attorney. When Hemmings suggested that she set up a meeting with her attorney present, Maxwell became angry and told Hemmings that he would "sooner pay $5 million to fight the lawsuit than to pay [her] a penny."

Hemmings and other Tidyman's' employees testified that Hemmings was denied admission to meetings and excluded from the chain of command pursuant to Maxwell's instructions after the discrimination letter. She no longer had the power to hire and fire staff. Despite the company's growth, Hemmings was not permitted to hire adequate staff for the expansion. Hemmings' salary was frozen from 1996 until 1999. She received a raise in March of 1999, days before the trial began. A treating psychiatrist testified that Hemmings developed severe depression as a result of her work environment.

B. Patty Lamphiear.

Patty Lamphiear started working for Tidyman's in 1984 as a part-time data entry clerk. She was promoted as the administrative assistant to Ken Ormsby, the manager of the Customer Prepaid Inventory ("CPI") department.

When Ormsby was moved to the position of bakery supervisor, Lamphiear assumed the CPI manager duties, but did not receive a salary increase for her new responsibilities. Although as CPI manager, Ormsby was paid $45,000 per year, Lamphiear's salary remained $9.75 per hour (less than $25,000 per year). In addition to her CPI managerial duties, Lamphiear later assumed responsibility for purchasing all direct store delivery ("DSD") products. Lamphiear ran the DSD department alone and without supervision, but was not given a title or supervisory powers, and her salary remained at less than $25,000 per year.

Tidyman's created a new position, grocery supervisor, in 1993. Lamphiear was not given an opportunity to apply for the unposted position, despite her familiarity and experience with the requisite computer and merchandising skills. George Hauserman was hired for the position, where he remained for one year, at an annual salary of $82,000. When Hauserman left, Lamphiear indicated her interest in the position to Jerry Streeter, the Chief Operating Officer. Streeter's response was to laugh and tell Lamphiear "there is no way that you could get the position, because the men in the company would run right over you." Another employee, Gregg Babbit, was promoted to the position and became Lamphiear's supervisor, even though Lamphiear possessed relevant computer skills and experience that Babbit lacked.

In 1995, Lamphiear reported to Tidyman's' management that Babbit had made inappropriate sexual remarks

during a meeting.[2] Ron Bashaw, a general manager who resigned from the company in part to protest its unfair treatment of women, testified regarding Babbit's attitude towards women employees as follows: "I don't believe [Greg Babbit] thought that [women] were capable of working in management, especially with the pressure that comes with it." Bashaw related that Babbit discussed women behind their backs to management, "[Babbit] put [women] down as far as sometimes the knowledge that they had."

An internal Tidyman's' wage study in August of 1995 indicated that Lamphiear had been underpaid by the company for the past four years and that she should have been paid between $38,000 and $45,000 per year. On August 31, 1995, Lamphiear's pay was raised from $28,600 to $35,000 – $3000 below the minimum recommended salary.

Lamphiear testified that after she and Hemmings served Tidyman's with the demand letter in July 1996, she also encountered threats and intimidation from male managers at Tidyman's. She was threatened by CEO Maxwell and insulted by CFO Davis. Lamphiear experienced the most problems with her new supervisor, Babbit, who verbally abused Lamphiear [3] and made veiled threats about eliminating her job.

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[2] Jack Rippee, a Tidyman's' store director who was present at the meeting, testified for the defense that his memory of the analogy was that Lamphiear "wouldn't recognize a good deal if it was three naked guys for a dollar."

[3] Lamphiear's therapist testified that Lamphiear was upset during visits because of Babbit's increasing use of inappropriate sexual

(Continued on following page)

Lamphiear's emotional health deteriorated rapidly. She began having nightmares and trouble sleeping. In 1997, Lamphiear attempted to set up a meeting with her supervisors related to a work project. After confirming that they would attend, none of the men came to the meeting. Lamphiear felt undermined and increasingly insecure at work. Her problems with Babbit continued to escalate. Although Lamphiear was working long hours, approximately eighty hours a week, Babbit continued to assign her new projects. When Lamphiear tried to refuse the projects, Babbit reported her to senior management as uncooperative. Feeling persecuted at work, Lamphiear experienced severe depression and her therapist placed her on a suicide watch.

At the recommendation of her doctor, Lamphiear left her position on sick leave, due to job-related stress. While on sick leave, Lamphiear was informed by Tidyman's that her position had been eliminated. Lamphiear was offered only lower-paid positions, working again under the supervision of Babbit. Lamphiear declined to accept these positions. Although Tidyman's eliminated Lamphiear's former position, a new employee was hired for a very similar position, entitled "DSD Buyer," which Babbit did not supervise.

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innuendos, including references to naked men and women and cutting off a penis.

II.

Procedural History

The plaintiffs brought suit against Tidyman's in federal court in February, 1997 for violations of the Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000(e) *et seq.*, and the Washington Law Against Discrimination, Revised Code of Washington ("RCW") § 49.60 *et seq.* The plaintiffs alleged that Tidyman's discriminated against them under both disparate impact and disparate treatment theories.[4] Before trial, both sides brought numerous motions in limine, including a motion by Tidyman's to exclude the testimony of the plaintiffs' statistical expert, Dr. Nyak Polissar ("Dr. Polissar"). The district court denied Tidyman's' motion and Dr. Polissar testified at trial.

At the close of the evidence, Tidyman's filed a motion for judgment as a matter of law contending, *inter alia*, that the Washington statute authorizing double damages for the willful and intentional deprivation of wages was not intended to cover an employer's failure to pay wages owed because of discrimination. The district court denied the defendant's motion.

The jury returned large verdicts for both Hemmings and Lamphiear. With respect to Hemmings, the jury found

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[4] " 'Disparate treatment' . . . is the most easily understood type of discrimination: The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. . . . Claims of 'disparate impact' . . . involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity." *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977).

by special verdict that Tidyman's discriminated against Hemmings under a disparate treatment theory by retaliating against her on the basis of her gender. The jury also found that Tidyman's discriminated against her under a disparate impact theory by failing to promote her and by failing to provide adequate pay and benefits on the basis of her gender.[5] The jury awarded Hemmings $120,000 in lost wages and benefits, $1,580,000 in future lost earnings and benefits, and $230,000 in non-economic damages, for a total of $1,930,000.

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[5] The following questions and answers are excerpted from the special jury verdict form for Connie Hemmings:

> *Question No. 1*: Did Defendant Tidyman's violate the law against disparate treatment discrimination by:
>
> (A) Not promoting Connie Hemmings on the basis of her gender?
>
> Answer: No.
>
> (B) Retaliating against Connie Hemmings on the basis of her gender?
>
> Answer: Yes.
>
> (C) Paying different compensation to Connie Hemmings on the basis of her gender?
>
> Answer: No.
>
> *Question No. 2*: Did Tidyman's violate the law against disparate impact discrimination by:
>
> (A) Not promoting Connie Hemmings on the basis of her gender?
>
> Answer: Yes.
>
> (B) Not providing greater pay and benefits to Connie Hemmings on the basis of her gender?
>
> Answer: Yes.

Special Jury Verdict form for Connie Hemmings, April 13, 1999.

In Lamphiear's case,[6] the jury found that Tidyman's violated the law against disparate treatment discrimination by failing to promote her, retaliating against her, and

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[6] The following questions and answers are excerpted from the special jury verdict form for Patty Lamphiear:

Question No. 1: Did Defendant Tidyman's violate the law against disparate treatment discrimination by:

(A) Not promoting Patty Lamphiear on the basis of her gender?

Answer: Yes.

(B) Retaliating against Patty Lamphiear on the basis of her gender?

Answer: Yes.

(C) Paying different compensation to Patty Lamphiear on the basis of her gender?

Answer: Yes.

Question No. 2: Did Tidyman's violate the law against disparate impact discrimination by:

(A) Not promoting Patty Lamphiear on the basis of her gender?

Answer: Yes.

(B) Not providing greater pay and benefits to Patty Lamphiear on the basis of her gender?

Answer: Yes.

Question No. 3: Did Tidyman's willfully and with intent to deprive Patty Lamphiear of any part of her past wages or other compensation, because of her gender, pay Patty Lamphiear a lower wage or compensation than Defendant Tidyman's was obligated to pay her?

Answer: Yes.

IF YOUR ANSWER TO QUESTION NO. 3 IS "YES", YOU MUST DOUBLE THE PORTION OF ANY AWARD FOR WAGES WILLFULLY AND INTENTIONALLY DEPRIVED PATTY LAMPHIEAR BY DEFENDANT WHEN CONSIDERING QUESTION NO. 4.

Special Jury Verdict form for Patty Lamphiear, April 13, 1999.

paying her different compensation on the basis of her gender. The jury further found that Tidyman's discriminated against Lamphiear under a disparate impact theory by failing to promote her and by failing to provide greater pay and benefits. The jury additionally found that Tidyman's violated the Washington state law against the willful and intentional deprivation of past wages. The jury awarded Lamphiear $596,500 in past lost wages and benefits, $1,024,000 in future lost earnings and benefits, and $650,000 in non-economic damages, for a total award of $2,270,500.

The district court, over Tidyman's' objections, sent the issue of punitive damages to the jury. The jury awarded each plaintiff $1 million in punitive damages.

After the jury returned the punitive damages awards, Tidyman's submitted a renewed motion for judgment as a matter of law on the grounds that the double damages are not available under Washington law in a discrimination case and that the plaintiffs failed to present a sufficient evidentiary basis for the punitive damages awards. At the same time, Tidyman's also filed a motion to alter or amend judgment in lieu of a new trial and a motion for a new trial. The district court denied the renewed motion concerning the double damages claim, the motion for a new trial, and the motion to alter or amend the judgment. However, the district court granted Tidyman's' renewed motion with regard to the punitive damages awards. The district court allocated the jury awards for non-economic damages to the plaintiffs' state law claims, rather than the Title VII claims. Having done this, the district court concluded that the Title VII damages cap on non-economic damages did not apply to non-economic damages awarded to plaintiffs for state law violations. Finally, the court

granted the plaintiffs' motion for attorney fees although it denied the plaintiffs' request for costs for depositions and preparation of the fees motion.

III.

Admission of the Statistical Expert Testimony

Tidyman's argues that the district court erred by admitting the testimony of the plaintiffs' statistical expert, Dr. Polissar, because the prejudicial effect of the testimony outweighed its probative value. Tidyman's also contends that the statistical evidence was insufficient to support the jury finding of disparate impact discrimination in either of the plaintiffs' cases. We review a district court's admissibility ruling on expert testimony for abuse of discretion. *United States v. Cordoba,* 194 F.3d 1053, 1056 (9th Cir. 1999). We will not reverse the admissibility ruling unless it is "manifestly erroneous." *Id.*

A. Dr. Polissar's Testimony.

The centerpiece of the plaintiffs' disparate impact case was the expert testimony of Dr. Polissar. Dr. Polissar testified that statistical analysis of Tidyman's' management revealed gender disparities in promotions and wages. In its pretrial motion to exclude Dr. Polissar's testimony, Tidyman's argued that Dr. Polissar's analysis included improper comparisons, which lacked probative value and would improperly prejudice the jury. The district court denied the motion, and ruled that any flaws in the analysis could be addressed through cross-examination

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or impeachment. The district court also stated if it determined that portions of Dr. Polissar's analysis were improper, it would give a limiting instruction to the jury.[7]

Tidyman's provided Dr. Polissar with information about the names, gender, starting salary and position, and ending salary and position of the employees in Tidyman's' management. Dr. Polissar testified about the statistical analysis he performed using this data.[8] Dr. Polissar concluded that women in management at Tidyman's earn an average of $12,000 less than men in management. The mean starting salary for women in management at Tidyman's was $26,400, while the mean starting salary for men was $38,400.

Dr. Polissar also testified that he analyzed the progression of wages of women and men over time as a method of controlling for factors other than gender – such as experience – that might explain the initial wage differential. Dr. Polissar used regression analysis [9] to control for differences in experience, and reached the same conclusion

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[7] Tidyman's did not renew its objection to Dr. Polissar's testimony at trial and no limiting instruction was given.

[8] At trial, Dr. Polissar testified that he had a masters and a doctoral degree in statistics from Princeton University, and that he had been a faculty member in the Department of Bio-statistics at the University of Washington for fifteen years before becoming a full-time consultant. Tidyman's did not object at any point on the ground that Dr. Polissar was unqualified, or that the statistical analysis he presented was outside of his area of expertise.

[9] "A regression analysis is a common statistical tool . . . designed to isolate the influence of one particular factor – e.g. sex – on a dependent variable – e.g. salary." *Equal Employment Opportunity Comm'n v. Gen. Tel. Co. of Northwest, Inc.*, 885 F.2d 575, 577 n.3 (9th Cir. 1989).

– that gender predicted a statistically significant wage differential. Dr. Polissar also performed a "step analysis," which compared the number of women to the number of men within each rank of Tidyman's' management hierarchy. Dr. Polissar explained that some of the step levels had no women employees, which made comparison analysis impossible for those levels. Where comparisons were possible, Dr. Polissar testified that the step analysis revealed wage differentials between men and women for most of the ranks. For example, at the "step four" level, which includes assistant store manager, office manager, system analyst, and controller, the average salary for female workers was $29,400, while the average salary for male workers was $40,800.

Finally, Dr. Polissar analyzed the distribution of men and women in different job categories at Tidyman's and concluded that the distribution reflected a pattern of segregation of men and women that was unlikely to be due to chance. [10] He also testified that the percentage of women in hourly positions was higher than the percentage of women in salary positions.

On cross-examination, Tidyman's attempted to show that Dr. Polissar's analysis was fundamentally flawed because it assumed that each individual was equally qualified. Tidyman's elicited testimony from Dr. Polissar that his analysis failed to take into account individual

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[10] Polissar testified to the following percentages of women and men employees by department: grocery, 100% men; meat, 83% men; produce, 94% men; floral, 100% women; pharmacy, 73% men; bakery, mixed; expresso, 93% women; store support, mixed; store management, 86.2% men; bookkeepers, 100% women.

qualifications, preferences, motivations, and individual fields.

B. The Standard for Admission of Expert Testimony.

Tidyman's argues that Dr. Polissar's testimony lacked probative value and prejudiced the jury. These arguments relate most directly to Federal Rules of Evidence 403 and 702. Rule 403 permits the exclusion of relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." Fed. R. Evid. 403. In applying Rule 403, "[d]istrict courts enjoy 'wide latitude'" *Fireman's Fund Ins. Co. v. Alaskan Pride P'ship,* 106 F.3d 1465, 1468 (9th Cir. 1997).

Rule 702 governs the admissibility of expert testimony. Fed. R. Evid. 702. Under Rule 702, expert testimony is admissible if the testimony "will assist the trier of fact to understand the evidence or to determine a fact in issue." *Id.* Whether testimony is helpful within the meaning of Rule 702 is in essence a relevancy inquiry. *See Raskin v. Wyatt Co.,* 125 F.3d 55, 67 (2d Cir. 1997) ("Expert testimony which does not relate to any issue in the case is not relevant, and ergo, non-helpful.") (quoting *Daubert v. Merrell Dow Pharm., Inc.,* 509 U.S. 579, 591 (1993)). The trial court acts as "gatekeeper" and determines whether expert scientific testimony is sufficiently relevant and reliable to be admissible. *Daubert,* 509 U.S. at 589.

C. Tidyman's' Challenges.

Tidyman's attacks the probative value of the statistical evidence on two grounds: (1) that Dr. Polissar used an inappropriate comparison pool; and (2) that Dr. Polissar's

analysis did not account for variables such as individual skills and preferences. Both arguments lack merit.

1. The Appropriate Comparison Pool.

Courts have long recognized that statistical evidence may be used to establish a prima facie case of disparate impact discrimination. *See, e.g., Hazelwood Sch. Dist. v. United States,* 433 U.S. 299, 307-08 (1977) ("Where gross statistical disparities can be shown, they alone may in a proper case constitute prima facie proof of a pattern or practice of discrimination."). The statistical evidence, however, must be drawn from appropriate comparison pools. In the context of statistical analysis, comparison "pools" are the groups of individuals from which data is collected and compared.[11] For example, information gathered from the census would be data from a general population pool.

The plaintiffs' expert in this case analyzed a data set comprised entirely of Tidyman's' management employees. Tidyman's contends that consideration of this pool was error because: (a) the data set did not included [sic] the "qualified" individuals for the at-issue jobs, and (b) the data set improperly included "store" management, instead of only "corporate" management. We reject both of these arguments.

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[11] *See generally* Kevin Gilmartin, *Identifying Similarly Situated Employees In Employment Discrimination Cases,* 31 JURIMETRICS J. 429 (1991).

a. Whether the Management Data Set Included the Qualified Individuals.

In support of its argument that the management data set failed to include the qualified individuals, Tidyman's relies upon the Supreme Court's opinion in *Wards Cove Packing Co. v. Atonio,* 490 U.S. 642, 650 (1989), the seminal case addressing appropriate comparison pools. In *Wards Cove,* the plaintiffs alleged, *inter alia,* that the defendant discriminated against black potential employees by either failing to hire them, or hiring them in the lower-wage cannery positions rather than the higher-wage, non-cannery positions. The plaintiffs attempted to introduce evidence comparing the percentages of black and white employees in the cannery positions with the non-cannery positions. *Id.* at 650. The Supreme Court found that this comparison analysis could not support a prima facie case of discrimination, because there was no evidence that the employees in the cannery jobs (pool 1) were qualified for the non-cannery jobs (pool 2). *Id.* at 651. The Supreme Court found that the analysis between the two pools was therefore not a meaningful measure of discrimination, and that the plaintiffs should have instead introduced evidence comparing the percentage of qualified black persons in the labor market (the qualified labor pool) with the percentage of qualified black persons hired in non-cannery positions (the pool actually hired). *Id.* at 650.

The general principle of *Wards Cove* – that the appropriate comparison pool for statistical analysis is the group from which individuals will be chosen for the job action – is appropriately applied in the plaintiffs' analysis, which uses a data set of Tidyman's' management. In *Wards Cove,* the plaintiffs challenged the hiring practices of the defendant. The appropriate comparison pool in *Wards Cove* was

thus the pool of potential applicants seeking to be hired – i.e., qualified individuals from the general population.

In the present case, the plaintiffs challenge the compensation and promotion practices of the defendant. "[I]n cases involving claims of promotion and wage discrimination, the employer's own workforce (or a portion thereof) may be the best source for data on the qualified labor market." BARBARA LINDEMAN & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 1714 (3d Ed. 1996).[12] Tidyman's fills higher management by internal promotions. Therefore, the potential applicant pool – and thus the appropriate comparison pool – for promotions to upper and middle management jobs at Tidyman's is comprised of the current employees in lower management positions. The analysis of Tidyman's' management data base included the qualified individuals under consideration for promotions. *See Shidaker v. Tisch,* 833 F.2d 627, 631 (7th Cir. 1987) ("Where a company is shown to promote from within, the relevant labor pool of qualified applicants for upper level positions may be the group of employees in the company from which promotees will be drawn.").

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[12] *See also* Julie Lee & Caitlin Lui, *Measuring Discrimination in the Workplace: Strategies for Lawyers and Policymakers,* 6 U. CHI. L. SCH. ROUNDTABLE 195, 198 (1999) ("If promotions or terminations within an organization are being examined, an internal benchmark would likely be used: the 'affected' pool of employees who seem to have differential rates of promotion or termination might be compared against benchmark pool of employees who are not 'affected.'"); *Stender v. Luck Stores,* 803 F. Supp. 259, 295-98 (N.D. Cal. 1992) (upholding the statistical analysis based entirely on employer workforce data where the plaintiffs challenged the placement and promotion practices of the employer).

Use of a data set comprised of the employer's entire management in a case challenging the failure to promote lower management to higher management and pay equal wages is consistent with the principle of *Wards Cove,* that the comparison pool for analysis should be the group from which individuals will be chosen for the job action, in this case promotion and payment of higher wages. In the instant case, Dr. Polissar testified to the existence of disparities between the percentages of female and male employees of Tidyman's in terms of their movement from middle or lower management to upper management positions. We find that Dr. Polissar appropriately used the employer management data set for his statistical analysis.

b. Store Management versus Corporate Management.

Tidyman's next attacks the plaintiffs' statistical evidence on the ground that Dr. Polissar improperly included the management employees of the local stores within the management data pool – rather than just the corporate management. Tidyman's contends that because the plaintiffs were not qualified for store management positions, the statistical analysis should not have included the store management employees.[13]

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[13] Tidyman's' attack involves disputed facts concerning the store management – namely, whether the two plaintiffs were qualified for store management positions and whether store experience was a prerequisite to store management positions. For example, Lamphiear testified that she was qualified to be a store manager. Ron Bashaw, a former Tidyman's' store manager, also testified that Lamphiear was qualified for a store management position. The plaintiffs introduced testimony that no objective criteria were used in awarding store

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Rather than argue that corporate positions and store management positions require entirely separate qualifications, Tidyman's asserts only that promotion to store management requires "special qualifications" that the two plaintiffs lacked. Tidyman's does not dispute that store management may be a career path to corporate management for some employees.[14] In other words, while there was contradictory testimony about whether Lamphiear and Hemmings were individually qualified for the store management positions, it was undisputed that store management positions could result in promotion to corporate management positions.

Tidyman's' argument misunderstands the purpose of including the store management employees. The data set had to include the store management employees to fully capture the potential pool of internal applicants for the upper level corporate management positions.[15] Inclusion of

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promotions. Tidyman's presented testimony that the individuals actually promoted to store manager and assistant manager positions all had store experience, which Lamphiear and Hemmings lacked.

[14] There is evidence that Tidyman's itself treated the corporate and store management employees as a group. For example, Tidyman's treated corporate staff and store management in the same group for the purpose of its salary policy. Tidyman's' internal corporate management flow charts include store director and manager positions.

[15] Even assuming that the two individual plaintiffs were unqualified for store management positions, the inclusion of the store management employees in the management data set was proper given the fluid movement of employees between the store and corporate management. In *Aiken v. City of Memphis*, 37 F.3d 1155 (6th Cir. 1994), the Sixth Circuit considered a similar argument in the context of alleged discrimination in promotion in the municipal fire and police departments. *Id.* at 1163. The Court rejected the argument that the inclusion of all patrol officers and fire privates in the pool was inappropriate

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the store management positions was necessary to analyze and compare promotions between men and women.[16]

In sum, the district court did not abuse its discretion by admitting the expert testimony based on the analysis of the data set of Tidyman's' management employees.[17]

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because not all of the patrol officers and fire privates were qualified for promotion. *Id.*

[16] *Moore v. Hughes Helicopters,* 708 F.2d 475, 482 (9th Cir. 1983), a case relied on by Tidyman's, is inapposite. In *Moore,* this court concluded that the plaintiffs failed to establish a prima facie case of discrimination by pointing to the low percentage of women in high job grades alone. *Id.* at 484. The court found that the statistical analysis lacked probative value because the plaintiff women did not have the skills for the higher job grades, and the higher job grades were heavily filled by applicants from outside of the company. *Id.*

The instant case is easily distinguishable: here, no one disputes that Hemmings and Lamphiear were qualified for upper level management jobs. Rather, Tidyman's challenges whether the plaintiffs were qualified for *each* of the management positions, including positions *below* their positions as controller and senior buyer. Tidyman's' organizational diagrams indicate that Hemmings' position as controller was higher in Tidyman's' hierarchy than the store management positions. Lamphiear's position as senior buyer was below the highest level of store management, on an even level with some of the store management positions, and above others.

Moore is distinguishable on other grounds as well. The statistical analysis used by Hemmings and Lamphiear involved interpretative statistical tools such as regression analysis rather than the straight percentage used in *Moore.* Additionally, in *Moore* the plaintiffs attempted to use statistics from an employer data set when the higher positions were filled from outside rather than internal applicants. In this case, Tidyman's promoted from within, and the use of the employer management data set is thus appropriate.

[17] An additional line of case law supports rejecting Tidyman's' argument that the store management employees should have been excluded from the data set. Federal courts have rejected defendant's arguments that statistical analysis should be limited to a pool of

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2. Individual Qualifications and Preferences.

Tidyman's next argues that Dr. Polissar's statistical analysis should have been excluded because it did not "eliminate all of the possible legitimate nondiscriminatory factors," including the employee's qualifications, level of education, and preferences. This argument also fails. We begin our analysis by noting that the law does not require the near-impossible standard of eliminating *all* possible nondiscriminatory factors. *See Bazemore v. Friday,* 478 U.S. 385, 400 (1986) ("Importantly, it is clear that a regression analysis that includes less than 'all measurable variables' may serve to prove a plaintiff's case.") (Brennan, J).

In *Bazemore,* the Supreme Court addressed the precise question presented by Tidyman's' appeal: if a study

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"qualified applicants" where the job qualification standards are themselves discriminatory. Failure to post vacancies and the use of subjective promotion practices – both practices of Tidyman's prior to the plaintiffs' lawsuit in 1996 – may be evidence of discrimination. *Paxton v. Union Nat'l Bank,* 688 F.2d 552, 563-64 (8th Cir. 1992). The Eleventh Circuit described the relevance of a lack of formal promotion procedures for statistical analysis:

> Courts should adopt the benchmark which most accurately reflects the pool of workers from which promotions are granted unless that pool has been skewed by other discriminatory hiring practices. Where, as here, no application is required for most promotions, it makes no sense to compare the percentage of . . . applicants . . . to the percentage of . . . appointees.

Forehand v. Florida State Hosp., 89 F.3d 1562, 1574 (11th Cir. 1996).

In the instant case, the plaintiffs introduced testimony that one of the informal requirements to a store management position was prior experience in a night crew position. A former store manager of Tidyman's testified that women were directed away from such positions.

fails to account for all variables, how should a court treat the study? Justice Brennan, writing for the court, explained that "[n]ormally, failure to include variables will affect the analysis' probativeness, not its admissibility." 478 U.S. at 400. In other words, in most cases, objections to the inadequacies of a study are more appropriately considered an objection going to the weight of the evidence rather than its admissibility. *See, e.g., Wilmington v. J.I. Case Co.*, 793 F.2d 909, 920 (8th Cir. 1986) ("Virtually all the inadequacies in the expert's testimony urged here by [the defendant] were brought out forcefully at trial . . . . [T]hese matters go to the weight of the expert's testimony rather than to its admissibility."). [18] Vigorous cross-examination of a study's inadequacies allows the jury to appropriately weigh the alleged defects and reduces the possibility of prejudice. *Fireman's Fund*, 106 F.3d at 1468; *United States v. L.E. Cooke Co.*, 991 F.2d 336, 342 (6th Cir. 1993). In this case, Tidyman's cross-examined Dr. Polissar extensively about the fact that the study did not account for all possible variables, such as educational differences.

In some cases, however, the analysis may be "so incomplete as to be inadmissable as irrelevant." *Bazemore*, 478 U.S. at 400 n.10. Tidyman's contends that failure to include the employees' individual qualifications, preferences, and education in the analysis rendered the analysis inadmissible under this standard. We disagree.

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[18] "Litigation generally is not fussy about evidence; much eyewitness and other nonquantitative evidence is subject to significant possibility of error, yet no effort is made to exclude it if it doesn't satisfy [a particular] statistic test." *Kadas v. MCI Systemhouse Corp.*, 255 F.3d 359, 362 (7th Cir. 2001).

First, Tidyman's did not prove at trial that any of these factors were important to the subjective and undefined promotion process or compensation awards. We have recognized that a defendant may not rest an attack on an "unsubstantiated assertion of error." *Gen. Tel. Co.*, 885 F.2d at 480. Rather, the defendant must "produce credible evidence that curing the alleged flaws would also cure the statistical disparity." *Id.* at 583. *Accord Sobel v. Yeshiva Univ.*, 839 F.2d 18, 34 (2d Cir. 1988) ("[A] defendant challenging the validity of a multiple regression analysis [must] make a showing that the factors it contends ought to have been included would weaken the showing of a salary disparity made by the analysis.").

In this case, the plaintiffs' expert "used the best available data, which [came] from the [defendant] itself." *Adams v. Ameritech Serv. Inc.*, 231 F.3d 414, 424 (7th Cir. 2000). If the defendant believed information about the employees' educational background, for example, would have explained the differences in promotions and compensation between male and female upper level employees, Tidyman's should have provided information about educational level to the plaintiffs, or at a minimum, introduced testimony that education was a central factor in promotions.

We cannot say that the exclusion of preferences, individual qualifications, and education rendered the data set so incomplete "as to be irrelevant." *Bazemore*, 478 U.S. at 400. Dr. Polissar's regression analysis accounted for experience and seniority within the company. By tracking the employees over time, Dr. Polissar was able to control outside factors that may have contributed to women originally being placed in lower management positions. *See Gen. Tel. Co.*, 885 F.2d at 582 (concluding that the

plaintiff's statistical analysis was probative of discrimination despite its failure to include employment interests); *Adams,* 231 F.3d at 427-28 (concluding that the defendant's objections that the analysis did not control for outside factors went to the weight of the evidence, not its admissibility); *Bruno v. W.B. Saunders Co.,* 882 F.2d 760, 766 (3d Cir. 1989) (affirming the district court's admission of statistical studies, despite the failure of the studies to take "account of the minimum qualifications of the jobs into which promotion or transfer occurred").[19]

In sum, the testimony of Dr. Polissar had probative value. The analysis could have helped the jury determine contested facts and evaluate whether the promotion and compensation practices of Tidyman's had a disparate impact or reflected disparate treatment against women at the management level. Any inadequacies in the methodology were presented to the jury by the cross-examination of Dr. Polissar. We conclude that the district court did not

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[19] Tidyman's cites *Ottaviani v. State Univ. of New York,* 875 F.2d 365 (2d Cir. 1989) for the proposition that a statistical study must include all possible nondiscriminatory factors. However, *Ottaviani* involved a specific challenge to the plaintiff's expert's decision to exclude *available* data about academic rank from the statistical analysis. *Id.* 374-75. The district court in *Ottaviani* ruled that academic rank was not in itself a discriminatory measure, and thus appropriate for inclusion in the analysis. Based on this ruling, the district court considered only the plaintiff's analysis that included rank. *Id.* at 375. Unlike in *Ottaviani,* the plaintiffs' expert in this case did not have available data of the criteria which Tidyman's complains are excluded, such as data about the employees' educational background. *Ottaviani,* which involved the inclusion of available data about one factor, cannot be read to stand for the broad proposition that a statistical study must include all possible criteria.

abuse its discretion by failing to exclude the plaintiffs' expert testimony.

IV.

Motion for a New Trial

Tidyman's also appeals the district court's denial of its motion for a new trial under Federal Rule of Civil Procedure 59 on the grounds that the great weight of the evidence is against the jury's findings, the verdict was excessive, and that counsel misconduct deprived the defendant of a fair trial. A district court may grant a motion for a new trial based on the insufficiency of the evidence only if the verdict "is against the 'great weight' of the evidence or 'it is quite clear that the jury has reached a seriously erroneous result.'" *Ace v. Aetna Life Ins. Co.*, 139 F.3d 1241, 1248 (9th Cir. 1998).

We review a district court's denial of a motion for a new trial for an abuse of discretion. *De Saracho v. Custom Food Mach., Inc.*, 206 F.3d 874, 880 (9th Cir. 2000). We will reverse the denial of a motion for new trial based on the insufficiency of the evidence only if the district court made a legal error in applying the standard for a new trial or if the record contains no evidence in support of the verdict. *See Landes Constr. Co. v. Royal Bank of Canada*, 833 F.2d 1365, 1372 (9th Cir. 1987).

A. The Weight of the Evidence.

The district court found that the jury verdict was not "against the clear weight of the evidence," and denied Tidyman's' motion for a new trial. Tidyman's contends that

the jury's findings of: (1) disparate impact in both plaintiffs' cases; (2) retaliation in both plaintiffs' cases; (3) discriminatory intent against Lamphiear; and (4) the equal pay violation in Lamphiear's case were against the great weight of the evidence. We conclude, however, that each of the jury's findings is supported by sufficient evidence in the record and affirm the district court's denial of the motion.

To establish a prima facie case of disparate impact under Title VII, the plaintiffs must: (1) show a significant disparate impact on a protected class or group; (2) identify the specific employment practices or selection criteria at issue; and (3) show a causal relationship between the challenged practices or criteria and the disparate impact. *Atonio v. Wards Cove Packing Co., Inc.,* 810 F.2d 1477, 1482 (9th Cir. 1987) (en banc). The plaintiffs sought to demonstrate that the subjective processes for awarding promotions, benefits, and salaries had a disparate impact on the two women. Dr. Polissar's statistical conclusions about the large disparities in salaries and the lack of women in upper management, as well as the anecdotal testimony by multiple witnesses about the subjective promotion processes and award of salary and benefits, is sufficient to support the jury's conclusion that the plaintiffs established a case of disparate impact discrimination.

The plaintiffs also had to show three elements to establish a prima facie case of disparate treatment discrimination: (1) membership in a protected class; (2) qualification for the position at issue; and (3) an adverse employment action. *See Morgan,* at 1016. The jury only found disparate treatment of Lamphiear. The jury heard the testimony of a former store manager that Lamphiear's gender affected the company's treatment of her, and that

she received significantly lower pay than her male counterparts. Tidyman's' own internal study found that Lamphiear was underpaid for her position. Multiple witnesses, including the plaintiffs, testified to gender-based discriminatory comments made by Tidyman's' male managers to, and about, the plaintiffs. This combined testimony is sufficient to support the jury finding of intentional discrimination against Lamphiear.

To meet their prima facie burden of establishing retaliation, Hemmings and Lamphiear needed to demonstrate: (1) they engaged in a protected activity; (2) they suffered an adverse employment action; and (3) the existence of a causal link between the activity and adverse action. *See Morgan v. Nat'l R.R. Passenger Corp.*, 232 F.3d 1008, 1017 (9th Cir. 2000). Testimony by Hemmings that she was denied promotion opportunities and pay raises, excluded from meetings, and otherwise shunned at work following her complaint letter concerning sex discrimination constitutes substantial evidence to support a jury conclusion that Tidyman's retaliated against her. Testimony by Lamphiear that she was berated, harassed, and given an additional workload following her complaint letter supports a jury finding of retaliation against Lamphiear.

Tidyman's contends that the great weight of the evidence is against finding an equal pay violation in Lamphiear's case because the plaintiffs failed to introduce sufficient evidence that Lamphiear's work was similar to Ormsby's, the supervisor whom Lamphiear replaced. Tidyman's argues that Lamphiear failed to establish that her position shared a "common core" of tasks with the position when held by Ormsby. *Cf. Stanley v. Univ. of California,* 178 F.3d 1069, 1074 (9th Cir. 1999) (discussing

the "common core" of tasks test under the more stringent Federal Equal Pay Act). Contrary to Tidyman's' contention, Lamphiear introduced testimony that she assumed the central responsibilities of the job, and was later given additional responsibilities. The jury could have easily credited this testimony and found that the positions shared a common core. Moreover, under the Washington State Equal Pay Act, a plaintiff need only prove that the employer paid different wages to men and women who performed similar work. *Adams v. Univ. of Washington,* 722 P.2d 74, 76-78 (Wash. 1986) (en banc).

In sum, we find that each of the contested jury findings was based on significant evidence in the record. Because evidence in the record supports the verdict, we conclude that the district court did not abuse its discretion by denying Tidyman's' motion for a new trial on the ground that the great weight of the evidence did not support the jury's findings.

B. The Size of the Damages Award.

Tidyman's next contends that the size of the damages awards meant that the jury must have been motivated by sympathy or sheer guesswork, and that the district court abused its discretion by not granting a new trial on this basis. We will not reverse a district court's denial of a motion for a new trial unless the damages are "grossly excessive or monstrous." *Los Angeles Memorial Coliseum Com'n v. NFL,* 791 F.2d 1356, 1360 (9th Cir. 1986).

The plaintiffs introduced testimony of a certified public accountant, Anson Avery ("Avery"), to support their request for damages. Avery testified that approximately

$4.4 million in damages were due to the plaintiffs collectively for past lost wages and future lost wages. The jury returned a verdict of $3.3 million for past lost wages and future lost wages. The jury returned a slightly higher verdict for Lamphiear than the amount Avery recommended as due, and returned a significantly lower verdict for Hemmings.[20]

The argument by Tidyman's that the jury verdict is grossly excessive is principally based on quibbles with Avery's calculations about the front and back pay awards. Avery testified that he calculated the "lost wages" amounts by comparing the salary and compensation packages for male executives in similar positions to the salary and compensation packages of the plaintiffs. In Hemmings' case, Avery included in his calculation of the "lost wages" the difference between Hemmings' salary had Tidyman's promoted her to the position of CFO and her salary without the promotion. For both women, Avery factored inflation and interest rates in calculating the recommended award. The defendant cross-examined Avery about various assumptions in his calculations – such as whether paid

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[20] In Lamphiear's case, Avery recommended an award of $1,405,865, and the jury returned an award of $1,620,500. The special verdict form instructed the jury to double the back pay award if it found that Tidyman's willfully deprived the plaintiff of wages. The jury concluded that Tidyman's did willfully deprive Lamphiear of wages, and presumably doubled the amount to reach a back pay award of $616,000. Without the doubling, the total jury award for front and back pay damages in Lamphiear's case would have been $1,311,500, an amount smaller than the amount Avery recommended. In Hemmings' case, the jury awarded $1,700,000 in front pay and back pay damages, although Avery recommended $3,004,497.

vacations and annuities should be included – and potential mathematical errors.

On appeal, Tidyman's contends that the alleged problems with Avery's calculations render the verdict "monstrous" because there is no evidence in the record to support the damage award. This argument clearly fails. As described above, the record supported conclusions of liability. Avery's lengthy and detailed testimony provided a basis for the jury to translate the liability into dollar amounts. Moreover, the jury's award was *below* the amount calculated by Avery. The fact that the jury may have agreed with Avery and rejected the defendant's contentions, for example, that compensation such as vacation time and annuities should not be included, does not render the verdict "grossly excessive or monstrous." The district court did not abuse its discretion by rejecting Tidyman's' motion for a new trial on this ground.

C. Counsel Misconduct.

Finally, Tidyman's contends that the district court erred by denying the motion for a new trial because of alleged misconduct by the plaintiffs' counsel. Recognizing that the district court is "in a superior position to gauge the prejudicial impact of counsel's conduct during the trial," we will not overrule a district court's ruling about the impact of counsel's alleged misconduct unless we have "a definite and firm conviction that the court committed a clear error of judgment." *Anheuser-Busch Inc. v. Natural Beverage Distribs.*, 69 F.3d 337, 346 (9th Cir. 1995) (internal quotations and citation omitted).

Generally, misconduct by trial counsel results in a new trial if the "flavor of misconduct sufficiently permeate[s] an entire proceeding to provide conviction that the jury was influenced by passion and prejudice in reaching its verdict." *Kehr v. Smith Barney,* 736 F.2d 1283, 1286 (9th Cir. 1994).

Tidyman's complains of several comments by plaintiffs' counsel during closing arguments.[21] The most significant comment was the following statement by the plaintiffs' attorney during the closing argument:

> [Tidyman's has] not corrected any of these [discriminatory] policies and they knew that they should because this is not the first time they have been sued. *I have sued them before in 1994,* so they had subjective policies which had disparate impact on all women, including plaintiffs, and that proves our case because they did not have a business necessity for doing it, and there were ways to fix it.

(Emphasis supplied).

Tidyman's failed to object to this statement or any other statement made by counsel during closing argument.

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[21] Tidyman's also complains that the plaintiffs' attorney referred to the defendant's case as a "jack rabbit defense," that a verbal assault on Lamphiear by one of the defendant's employees was a rape of her mind, that a female board member and a paralegal sitting at the counsel table were mere "tokens." While in poor taste, these comments do not rise to the level of misconduct. Tidyman's itself made similar remarks in its closing arguments. For example, it referred to the plaintiffs case as "a whole big bag of rabbits the plaintiffs brought in, [because] their case has no merit and they want to distract you."

Nor did Tidyman's move for a mistrial on the basis of counsel's misconduct. The first time Tidyman's complained of the misconduct was in its motion for a new trial. The district court noted that it would have sustained an objection to the comment during closing argument: "I remember the comment and I thought I sua sponte corrected it, but maybe I just thought about it and would have sustained an objection had one been made because it was totally improper." Although the district court acknowledged the impropriety of the remark, it denied the motion for a new trial and ruled that a new trial was not necessary to avoid a miscarriage of justice.

The federal courts erect a "high threshold" to claims of improper closing arguments in civil cases raised for the first time after trial. *Kaiser Steel Corp. v. Frank Coluccio Constr. Co.,* 785 F.2d 656, 658 (9th Cir. 1986). The rationale for this high threshold is two-fold. First, raising an objection after the closing argument and before the jury begins deliberations "permit[s] the judge to examine the alleged prejudice and to admonish . . . counsel or issue a curative instruction, if warranted." *Id.* As noted above, the trial judge is in a superior position to evaluate the likely effect of the alleged misconduct and to fashion an appropriate remedy. The second rationale stems from courts' concern that allowing a party to wait to raise the error until after the negative verdict encourages that party to sit silent in the face of claimed error.

"We will review for plain or fundamental error, absent a contemporaneous objection . . ., where the integrity or fundamental fairness of the proceedings in the trial court is called into serious question." *Bird v. Glacier Electric Coop. Inc.,* 255 F.3d 1136, 1148 (9th Cir. 2001).

Plain error review requires: (1) an error, (2) the error is plain or obvious, (3) the error was prejudicial or effects substantial rights, and (4) review is necessary to prevent a miscarriage of justice. *See Smith v. Kmart Corp.*, 177 F.3d 19, 25 (1st Cir. 1999) (describing the plain error standard in a civil counsel misconduct case). "Plain error is a rare species in civil litigation, encompassing only those errors that reach the pinnacle of fault envisioned by the standard set forth above." *Id.* at 26 (internal citations and quotations omitted).

We readily conclude that the plaintiffs' counsel's statement during closing argument was error. Counsel inappropriately referred to other cases that she herself had litigated. The fact that she personally had litigated the cases had no relevance to the lawsuit. Nor should she have suggested that this litigation "proved the case." We also find that the error was "plain." Plaintiff's remarks were obviously improper and blatant enough for the trial judge to recall them easily.

We next must consider whether counsel's error was prejudicial and fundamentally unfair. "[T]he burden of making a 'concrete showing of prejudice' resulting from improper closing argument falls upon appellant." *Moses v. Union Pac. R.R.*, 64 F.3d 413, 418 (8th Cir. 1995). In evaluating the likelihood of prejudice from the comments, we should consider "the totality of circumstances, including the nature of the comments, their frequency, their possible relevancy to the real issues before the jury, the manner in which the parties and the court treated the comments, the strength of the case, and the verdict itself." *Puerto Rico Aqueduct & Sewer Auth. v. Constructora Lluch, Inc.*, 169 F.3d 68, 82 (1st Cir. 1999); *see also Cooper v. Firestone Tire & Rubber Co.*, 945 F.2d 1103, 1107 (9th

Cir. 1991) (declining to find reversible error where "the alleged misconduct occurred only in the argument phase of the trial . . . the remarks were isolated rather than persistent, . . . most of counsel's comments were not objected to at trial and appellants did not move for a mistrial at the end of the argument").

We note, however, that this remedy is available only in "extraordinary cases." *Bird,* 255 F.3d at 1148. For instance, in *Bird,* the court concluded that counsel's closing arguments offended fundamental fairness where counsel: (1) argued in inflammatory terms; (2) linked the defendant's behavior to white racism in exploitation of Indians; (3) appealed to historical racial prejudices of or against the white race; and (4) used incendiary racial and nationalistic terms to encourage the all-tribal member jury to award against the non-Indian defendant. *Id.* at 1152.

The misconduct in this case is substantially different from the misconduct in *Bird.* Here, the misconduct was an isolated, short comment during a closing statement that covered 66 pages when transcribed. Tidyman's urges us to weigh other instances where the plaintiffs referred to prior lawsuits against Tidyman's as evidence that the plaintiffs deliberately violated the district court's ruling excluding such references. Tidyman's first points to its testimony by Hemmings and contends that, in conjunction with her testimony, the "district court sustained defense counsel's objections to testimony that Tidyman's had been sued before." A review of the record does not support this contention.

Hemmings testified about conversations that she had with the director of loss prevention, "the discussions that I had with him were that we [Tidyman's] had been sued

before and we lost and we need to get women in management positions." The defense objected to this statement on hearsay grounds, and the trial court sustained the objection. Hemmings then testified as follows, without objection by defense counsel:

Q: Connie, what was your part of the conversation with Mr. Armstrong?

A: That we needed to get more management – women in management positions to prevent getting continually sued.

Q: And you indicated that the company has been sued before. Do you know who had sued the company; were they women?

A: There were two women and one – actually two guys that I know of.

Q: And did those women sue the company for discrimination?

A: Yes.

Hemmings went on to describe the failure of the defendant to establish programs that would have supported the movement of women into management programs, despite corporate recognition of the need for such programs. Tidyman's did not object to any portion of this testimony.

The jury also heard from the plaintiffs' expert, Dr. Polissar, that Tidyman's had been sued before by plaintiffs' counsel:

Q: Have you ever – have you and I ever worked together before?

A: Yes, we have on one other case.

Q: And what case was that?

A: That was a case – a lawsuit against Tidyman's and you were representing the plaintiff and you asked me to help out on that.

Q: And was our plaintiff a woman?

A: Yes.

Q: And what were you analyzing?

A: Well, at that point –

Defense Counsel: Objection, Your Honor, that is not this case.

The Court: I will sustain the objection. That is enough.

The defense counsel did not move to strike the portion of Dr. Polissar's testimony referring to the prior lawsuit against Tidyman's. The jury thus learned, without objection by the defense counsel, that the plaintiffs' counsel had sued Tidyman's before, that Tidyman's had lost gender discrimination cases in the past, and that the plaintiffs' expert, Dr. Polissar, worked with plaintiffs' counsel in another case against Tidyman's.

The actions by the court and the parties support an inference that the misconduct was not prejudicial or fundamentally unfair. Although the district court noted that the reference was error, he did not sua sponte issue a correction, instead preferring to wait to issue a limiting instruction until counsel objected. The fact that counsel did not object before the jury was instructed strongly suggests that counsel made a strategic decision to gamble on the verdict and suspected that the comments would not sway the jury.

The strength of the plaintiffs' case is another factor that weighs against a finding of fundamental unfairness. The plaintiffs' expert testimony went largely unrefuted. The plaintiffs introduced compelling testimony about a discriminatory culture and the disparate impact of the discrimination on women's pay and promotion options. In the absence of counsel's improper statements, we cannot say that we think a different verdict was likely. We conclude that the district court did not abuse its discretion by denying Tidyman's' motion for a new trial because of counsel misconduct during the closing statement.

V.

Tidyman's' Motion to Cap the Loss Award to $300,000

Title VII, as amended by the Civil Rights Act of 1991, limits compensatory and punitive damages based on the size of the defendant corporation. For a plaintiff suing a company with more than 500 employees, damages are capped at $300,000. 42 U.S.C. § 1981a(b)(3) (1998). The damages limit does not apply to back pay awards, or to relief authorized by 42 U.S.C. § 2000e-5(g). *See* 42 U.S.C. § 1981a(b)(2). Tidyman's argues that the district court erred by not applying the § 1981a damages cap to: (1) the plaintiffs' front pay awards; and (2) to the Washington state law discrimination claims. Both arguments lack merit.

Denial of a motion to amend the judgment is reviewed for abuse of discretion. *Kingvision Pay-Per-View Ltd. v. Lake Alice Bar,* 168 F.3d 347, 350 (9th Cir. 1999). "While the district court generally has discretion regarding how to

allocate the damage award, to the extent that the allocation rests on an interpretation of the statute, we review it de novo." *Passantino v. Johnson & Johnson Consumer,* 212 F.3d 493, 509 (9th Cir. 2000).

A. Front Pay.

Tidyman's' argument that the statutory cap under § 1981a(b)(3) should apply to front pay awards is foreclosed by the Supreme Court's recent decision in *Pollard v. E.I. DuPont de Nemours Co.,* 532 U.S. 843, 121 S.Ct. 1946 (2001). In *Pollard,* the Supreme Court considered whether the term "compensatory damages" in § 1981a included front pay awards. Following every circuit to address the question except the Sixth, the Supreme Court ruled that front pay is excluded from "compensatory damages" and thus is not subject to the statutory cap. *Id.* at 1949.

As the Supreme Court explained, the statutory cap was adopted in 1991 as part of the Civil Rights Act. *Id.;* Civil Rights Act of 1991, 105 Stat. 1071, § 2. The Civil Rights Act provisions expanded the remedies available to plaintiffs for intentional discrimination by providing that the plaintiff could recover "compensatory and punitive damages . . . *in addition to* " relief authorized under § 706(g) of the Civil Rights Act of 1964. 42 U.S.C. § 1981a(a)(1). The new remedies – not authorized by § 706(g) – in turn are subject to the statutory cap. *Pollard,* 121 S.Ct. at 1950. The Supreme Court concluded that front pay awards were available under § 706(g), and therefore excluded under the term "compensatory damages," within the meaning of the 1991 Civil Rights Act. *Id.* at 1952. Following *Pollard,* we reject Tidyman's' claim that

the Title VII statutory cap applied to the plaintiffs' front pay awards.

B. Application of the Statutory Cap to Washington State Law Claims.

Tidyman's' second argument is that the district court abused its discretion by failing to apply the Title VII damages cap to the state damages awards. Tidyman's contends that even if the awards were controlled entirely by state law, the federal damages cap applies because Washington courts look to federal law when interpreting their anti-discrimination statutes.

Tidyman's does not challenge the district court's allocation of the non-economic damages to the state law claims. The special verdict form in this case did not differentiate plaintiffs' state and federal law claims. Any portion of the non-economic damages allocated to the federal Title VII claim would be subject to the $300,000 cap. In this case, Hemmings was awarded $230,000 in non-economic damages, an amount less than the federal cap. Tidyman's' argument thus potentially applies only to the $650,000 non-economic damages the jury awarded to Lamphiear, which the district court allocated to Lamphiear's state law claims.

Tidyman's argues that we should apply the federal damages cap to the state law discrimination claim because Washington state courts, "in the absence of state authority," will consider federal law "persuasive" when construing sections of the Washington anti-discrimination law that "parallel" the federal law. *Xieng v. Peoples Nat'l Bank*, 844 P.2d 389, 399 (Wash. 1993) (en banc); *Goodman v. Boeing*, 877 P.2d 703, 713 (Wash. Ct. App. 1994). In

Passantino, however, we rejected the defendant's argument that the Title VII cap should apply to the Washington Law Against Discrimination. 212 F.3d at 509-10. We noted that Title VII explicitly prohibits limiting state law remedies and that Title VII was not intended to force plaintiffs to choose among remedial statutes. *Id.* at 510. We do not find any evidence in the form of case law, statutory language, or legislative history indicating an intent by the Washington legislature to cap damage awards at $300,000. Accordingly, we conclude, consistent with our ruling in *Passantino,* that the Title VII damages cap does not apply to the Washington state law discrimination claims.

VI.

Punitive Damages

The plaintiffs cross-appeal the district court's finding that punitive damages are not available as a matter of law. The plaintiffs contend that the district court applied the wrong standard in granting Tidyman's' renewed motion that, as a matter of law, the evidence was insufficient to support an award of punitive damages. Specifically, the plaintiffs allege that the district court failed to consider adequately the directives of the Supreme Court's decision in *Kolstad v. Am. Dental Ass'n,* 527 U.S. 526 (1999). The plaintiffs argue that under *Kolstad,* the district court should have denied the defendant's renewed motion for judgment as a matter of law.

"Judgment as a matter of law is appropriate when the evidence, construed in the light most favorable to the nonmoving party, permits only one reasonable conclusion, which is contrary to the jury's verdict." *Gilbrook v. City of*

Westminster, 177 F.3d 839, 864 (9th Cir.), *cert. denied,* 120 S.Ct. 614 (1999) (quoting *Omega Envtl., Inc. v. Gilbarco, Inc.,* 127 F.3d 1157, 1161 (9th Cir. 1997)). We review de novo legal conclusions about the availability of punitive damages. *See EEOC v. Wal-Mart Stores, Inc.,* 156 F.3d 989 (9th Cir. 1998).

The district court instructed the jury that the plaintiffs were entitled to punitive damages if they demonstrated that Tidyman's' conduct was willful and egregious, or displayed a reckless indifference towards the plaintiffs' federal civil rights. The jury awarded each plaintiff $1 million in punitive damages. After the verdict, however, Tidyman's made a renewed motion that the punitive damages were not supported by the evidence as a matter of law. The district court granted the defendant's motion. The district court found that the plaintiffs "did not present a legally sufficient evidentiary basis for a reasonable jury to find by a preponderance of the evidence that Defendant's conduct toward either Plaintiff was willful *and* egregious or displayed a reckless indifference to the Plaintiff's federal rights sufficient to justify an award of punitive damages." (Emphasis supplied).

In the interim between the jury's deliberations of the punitive damages award and the district court ruling on the motion for a judgment as a matter of law, the Supreme Court decided *Kolstad.* In *Kolstad,* the Supreme Court resolved a circuit split over the appropriate standard for determining the availability of punitive damages under Title VII by establishing a three-part inquiry to address when the evidence supports a punitive damages verdict. 527 U.S. at 530.

In the first step, the Supreme Court clarified the requisite mental state of employers, the analysis primarily at issue in this case. Under Title VII, the jury may award punitive damages if the moving party demonstrates that "the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual." 42 U.S.C. § 1981a(b)(1). Interpreting this section, the Supreme Court concluded that Congress intended to impose a heightened standard of liability for the award of punitive damages, but rejected the argument that the heightened standard requires that an employer's behavior be "egregious." *Kolstad,* 527 U.S. at 534-35. Instead, the Court concluded that Congress intended for punitive damages to apply in intentional discrimination cases where the plaintiff can show that the employer knowingly or recklessly acted in violation of federal law. *Id.* at 535.

The Court found that the questions of malice and reckless indifference are subjective questions concerning the employer's motive or intent, rather than an objective inquiry into whether the employer's behavior is "egregious." *Id.* at 535-38. The defendant is appropriately subject to punitive damages if it acts "in the face of a perceived risk that its actions will violate federal law." *Id.* at 536. The Supreme Court explained that although egregious conduct could be evidence of an intentional violation of the law, it was not a necessary element. *Id.* at 535.

The Supreme Court also held that the plaintiff must "impute liability for punitive damages to respondent." *Id.* at 539. Under this step, the plaintiff must show that the intentional discrimination by an employee is attributable

to the employer by using traditional agency principles, e.g., that a managerial employee acted within the scope of his or her employment. *Id.* at 540-41.

Finally, the Supreme Court clarified that the defendant employer may raise as an affirmative defense its good faith efforts to comply with Title VII, if such efforts were contrary to the actions of its managerial agents. *Id.* at 545-46. As we noted in *Passantino,* the Supreme Court did not eliminate the rule that a sufficiently senior agent may be treated as the corporation's proxy. *Passantino,* 212 F.3d at 516. The affirmative defense is thus unavailable to the employer for the actions of agents sufficiently senior to be considered proxies. *Id.* at 516-17.

Although the district court was aware of *Kolstad,*[22] it did not apply the *Kolstad* framework to the question of the availability of punitive damages in this case. Importantly, the district court applied the old, pre-*Kolstad* standard for demonstrating the relevant mental state of the defendant by requiring that the plaintiff establish sufficient evidence that the defendant's conduct toward either plaintiff "was willful *and* egregious or displayed a reckless indifference." (Emphasis supplied). As discussed above, the plaintiffs did not need to demonstrate "egregious" conduct. We conclude that the district court erred by applying the incorrect standard for determining the availability of punitive damages.

Both parties urge us to review the record to determine if the evidence was legally sufficient to support an award

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[22] Plaintiffs' counsel addressed the *Kolstad* opinion at oral argument on the defendant's motion for judgment as a matter of law.

of punitive damages by a reasonable jury.[23] We conclude that it was and reinstate the punitive damages awards.

Under *Kolstad,* we must begin by asking whether Tidyman's acted with malice or reckless indifference – whether Tidyman's "acted in the face of a perceived risk that its actions will violate federal law." *Kolstad,* 527 U.S. at 536. In this case, the district court found that the jury verdicts of intentional discrimination in the form of retaliation against both plaintiffs and failure to promote Lamphiear were supported by sufficient evidence.

We noted in *Passantino* that after *Kolstad,* "in general, intentional discrimination is enough to establish punitive damages liability." 212 F.3d at 515. We then cited the examples noted by the Supreme Court of situations in which intentional discrimination would not give rise to punitive damages liability. *Id.* For example, if the plaintiff relied upon a novel theory of discrimination, the evidence might not support a conclusion that the defendant acted with the awareness that it might violate the law. *Id.* Alternatively, in rare cases, the defendant might actually be unaware of Title VII's anti-discrimination mandates. *Id.*

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[23] We agree with other circuits that the ruling in *Kolstad* was not so novel as to require a remand to provide the defendant an opportunity to supplement the record. *See Rubinstein v. Adm'r of the Tulane Educ. Fund,* 218 F.3d 392, 406 (5th Cir. 2000) ("We will consider Tulane's motion for a judgment as a matter of law, with respect to punitive damages, by applying *Kolstad,* in full to the record before us, without concern that our retroactive application is unfair."); *see also Blackmon v. Pinkerton Sec. & Investigative Servs.,* 182 F.3d 629, 636 (8th Cir. 1999).

In *Passantino,* we found that the mental state element was satisfied because the jury could have concluded that the defendant acted with reckless disregard for plaintiff's rights based on evidence that the defendant's employees lied to the plaintiff to conceal their discriminatory actions. *Id.* at 516. Other circuits have found punitive damage awards appropriate under the *Kolstad* framework where the plaintiff demonstrated that the defendants were aware of anti-discrimination principles. *See, e.g., Bruso v. United Airlines Inc.,* 239 F.3d 848, 858 (7th Cir. 2001) (holding that a plaintiff may satisfy the mental state "element by demonstrating that the relevant individuals knew of or were familiar with the anti-discrimination laws and the employer's policies for implementing those laws"); *Romano v. U-Haul Int'l,* 233 F.3d 655, 669 (1st Cir. 2000) (finding liability because the manager was aware of the company's anti-discrimination policies); *Lowery v. Circuit City Stores, Inc.,* 206 F.3d 431, 443 (4th Cir. 2000) (finding that the employer discriminated in the face of a perceived risk of violating federal law where the manager was aware of the existence of federal anti-discrimination laws); *Equal Employment Opportunity Comm'n v. Wal-Mart Stores, Inc.,* 187 F.3d 1241, 1246 n.3 (10th Cir. 1999) (finding liability for punitive damages where the defendant "was aware of the prohibitions against workplace discrimination and . . . had a company wide policy designed to ensure compliance").

The record contains substantial evidence from which a reasonable juror could conclude that Tidyman's was aware of anti-discrimination laws and acted in the face of this awareness. The plaintiffs introduced testimony that Tidyman's hired additional women in store management

positions, in part because of its concern about legal exposure for discriminatory practices. The plaintiffs also introduced testimony that the defendants excluded plaintiffs from decision making processes and harassed the plaintiffs *after* they sent their discrimination complaint. The jury could have easily concluded from this testimony that Tidyman's intentionally discriminated against the plaintiffs in face of the risk that it was violating the law.

Based on the record, there is no doubt that discriminatory actions by Tidyman's' management officers can be imputed to Tidyman's. The plaintiffs' claims of intentional discrimination were based on the conduct of Jerry Streeter, the Chief Operating Officer; John Maxwell, the Chief Executive Officer; Mike Davis, the Chief Financial Officer; and Gregg Babbit, the grocery supervisor, among others. Tidyman's does not argue that the actions of management were contrary to the good faith non-discriminatory policies of the company, probably because on appeal Tidyman's continues to assert that the actions themselves were non-discriminatory.[24]

Based on our review of the record, we cannot say that the only reasonable conclusion is contrary to the jury's

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[24] Tidyman's does appear to concede that the sexually inappropriate joke by Babbit could be evidence of discrimination towards women. Tidyman's contends that management swiftly responded by directing Babbit towards counseling after learning of this remark. Certainly, this type of evidence might establish a defense under *Kolstad*. However, we must review the evidence in the light most favorable to the plaintiffs. The plaintiffs introduced contrary evidence that Tidyman's' management permitted Babbit to forgo the recommended counseling. More importantly, the plaintiffs' cases of intentional discrimination were based on the actions of multiple senior officers, not just Babbit.

verdict awarding punitive damages. Testimony and trial evidence support a determination by a reasonable jurist that Tidyman's acted in the face of a perceived risk that its actions would violate federal law. We therefore reverse the district court's ruling that, as a matter of law, the evidence was insufficient to support the jury's awards of punitive damages.

VII.

Attorneys Costs

The district court awarded $62,638.16 in attorneys fees and costs, adopting in whole the plaintiffs' cost affidavit with the exception of deposition costs and the costs for assembling the affidavit in support of attorneys fees. The plaintiffs contend that the district court abused its discretion by excluding the costs for depositions, $18,060.65, and the costs for preparing the attorneys fees motion, $2,775.21, from the fee award. Attorneys fee awards are reviewed for abuse of discretion. *Fischer v. SJB-P.D., Inc.*, 214 F.3d 1115, 1118 (9th Cir. 2000).

Both deposition costs and costs for preparation of attorneys fees motions are recoverable under Title VII in certain circumstances. *See Harris v. Markhoefer,* 24 F.3d 16, 19 (9th Cir. 1994) (holding that plaintiffs may recover out-of-pocket expenses and expenses related to discovery and expert witnesses under § 1988). "Normally [the attorneys fees award] will encompass all hours reasonably expended on the litigation," however, the "district court should . . . exclude from this initial fee calculation hours that were not 'reasonably expended.'" *Hensley v. Eckerhart,* 461 U.S. 424, 433-34 (1983).

In this case, the district court could have determined within its discretion that the hours preparing some of the witnesses or taking the depositions were overinflated or unnecessary. *See Van Gerwen v. Guarantee Mutual Life Co.*, 214 F.3d 1041, 1045 (9th Cir. 2000) (holding that district courts should not include hours that are "excessive, redundant, or otherwise unnecessary") (*quoting Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983)). We therefore find that the district court did not abuse its discretion by denying costs for depositions or preparation of the motion for attorneys fees.

THOMAS, Circuit Judge, in which Judges PREGERSON and GOULD joined:

VIII.

The Constitutionality of the Title VII Cap on Punitive Damages

The statutory limitation on damages contained in 42 U.S.C. § 1981a(b)(3), which imposes a $300,000 cap on compensatory and punitive damages in Title VII suits against employers with more than 500 employees, does not violate the doctrine of separation of powers or the Seventh Amendment.

The § 1981a damages cap does not represent an impermissible intrusion by the legislature into the province of the judiciary. Whether Congress may reopen a final judgment of an Article III court is not in question; the law is clear that Congress may not do so. *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 240 (1995). However, Congress

has significant power to define and circumscribe self-created causes of action. Indeed, almost two decades ago, the Supreme Court articulated a vital distinction between common law causes of action and actionable rights created by Congress. Specifically, the Court noted that

> when Congress creates a statutory right, it clearly has the discretion, in defining that right, to create presumptions, or assign burdens of proof, or prescribe remedies. . . . Such provisions do, in a sense, affect the exercise of judicial power, but they are also incidental to Congress's power to define the right that it has created.

Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 83 (1982). Title VII epitomizes such a congressionally created right; as such, its remedies – including type and quantity of damages – may be legislatively determined without violating separation of powers. *Cf. Lauf v. E.G. Shinner & Co.*, 303 U.S. 323, 330 (1938) (upholding an act of Congress removing the jurisdiction of the district court to issue injunctive relief in a labor dispute).

"Title VII of the Civil Rights Act of 1964 is not a statute to which would apply the traditional presumption in favor of all available remedies. That statute did not create a general right to sue for employment discrimination, but instead specified a set of circumscribed remedies." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 286 n.38 (1994). The § 1981a damages cap perfectly illustrates the extent of Congressional power to delineate contours of such a Congressionally-created cause of action. Prior to the enactment of the Civil Rights Act of 1991, Title VII forbade imposition of punitive, or of compensatory, damages; the original Act provided only for equitable remedies.

In 1991, Congress determined that victims of employment discrimination were entitled to additional remedies. *Pollard v. E. I. DuPont de Nemours Co.*, 121 S.Ct. 1946, 1951 (2001). But, as legislative history makes clear, the 1991 Act would not have been passed by Congress *but for* the inclusion of a punitive damages cap:

> [u]nfortunately, the political process forced Congress to leave its task unfinished. The 1991 Act contained a number of important and controversial provisions. When a compromise was finally reached, it included § 1981a's restrictions of damages. In the interest of securing prompt passage of the Civil Rights Act of 1991, including the portion guaranteeing the right to damages, Congress accepted the restrictions on damages, and left to 1992 the task of providing full, fair, and equal remedies for victims of discrimination.

S. Rep. 102-286 at *2 (May 21, 1992). As the Sixth Circuit has observed, "[t]he fact that the judicial branch is limited in the amount of damages which it may award does not mean that its ability to decide cases is being impaired by Congress." *Pollard v. E.I. DuPont de Nemours Co.*, 213 F.3d 933, 946 (6th Cir. 2000), *rev'd on other grounds by Pollard,* 121 S.Ct. 1946 (2001).

Plaintiffs further argue that, even if the damages cap does not violate separation of powers, it unconstitutionally infringes on the province of the jury as defined in the Seventh Amendment. Essentially, Plaintiffs claim that, once Congress in 1991 provided for a jury trial in Title VII cases, it could not then circumscribe the ability of that jury to make factual findings, including a finding of the proper amount of punitive damages. Again, we disagree.

The Supreme Court has not specifically addressed this question, although it has noted that courts of appeals have upheld such caps against Seventh Amendment challenges. *Gasperini v. Ctr. for Humanities,* 518 U.S. 415, 429 n.9 (1996). However, Justice Stevens noted in his concurrence to *Gasperini* that

> it is well settled that jury verdicts are not binding on either trial judges or appellate courts if they are unauthorized by law. A verdict may be insupportable as a matter of law either because of deficiencies in the evidence or because an award of damages is larger than permitted by law.

Id. at 2227 (Stevens, J., concurring).

The Supreme Court's recent ruling in *Pollard* impliedly affirms Justice Stevens' conclusion. *Pollard* did not disturb the Sixth Circuit's holding that the Title VII damages cap is constitutional: The Court held only that front-pay awards are not an element of compensatory damages, and thus are not subject to the cap. *Id.* at 1949. In fact, in defining the ambit of the Title VII damages cap, the Court seemingly sanctioned the Sixth Circuit's conclusion. *See id.* at 1951 ("However, compensatory and punitive damages awarded under § 1981a may not exceed the statutory limitations set forth in § 1981a(b)(3). . . . "); *see also Feltner v. Columbia Pictures Television, Inc.,* 523 U.S. 340, 355 (1998) (holding that the Seventh Amendment includes a right to a jury determination of statutory damages under § 504(c) of the Copyright Act, but not addressing the fact that the Act limits damages to amounts between $500 and $20,000).

The Seventh Amendment does not provide unlimited protection to jury determinations. For example, when a punitive damage jury verdict "can fairly be categorized as 'grossly excessive' in relation to [legitimate state] interests," the Due Process Clause requires judicial intervention. *BMW of North Am. v. Gore,* 517 U.S. 559, 568 (1996). Here, Congress has merely definitively explained what constitutes excessive damages. Congress may "prescribe" a "rule of decision" in such a context. *See Robertson v. Seattle Audubon Soc.,* 503 U.S. 429, 440 (1992) (noting that in the context of statutorily created rights, Congress may amend a statute in such a way as to have the effect of prescribing rules of decision in specific cases). Other Circuits to have considered this issue agree. *See Madison v. IBP, Inc.,* 257 F.3d 780, 804 (8th Cir. 2001). As the Eighth Circuit explained it:

> Congress created the Title VII cause of action and has the power to set limits for recovery under it. The statute does not violate the Seventh Amendment because it does not impinge upon the jury's fact finding function. In applying a provision, a court does not 'reexamine' the jury's verdict or impose its own factual determination as to what a proper award might be. Rather, it implements the legislative policy decision by reducing the amount recoverable to that deemed to be a reasonable maximum by Congress.

We further note the paradoxical implications of Plaintiffs' claim: If a judge cannot limit damages found by a jury in accordance with a statute, how can a judge impose statutorily mandated double or treble damages without also imposing on the jury's province as sole fact-finder? And yet "[a]wards of double or treble damages authorized by statute date back to the 13th century . . .

and the doctrine was expressly recognized in cases as early as 1763." *Browning-Ferris Ind. of Vermont, Inc. v. Kelco Disposal Inc.*, 492 U.S. 257, 274 (1989).

In sum, what Congress can create, Congress can define. Title VII's damages cap does not interfere with the proper exercise of authority by the judicial branch, nor does it offend the Seventh Amendment. Because Title VII's damages limitation passes constitutional muster, we affirm the district court's judgment applying it.

THOMAS, Circuit Judge, in which Judge GOULD joined:

IX.

Double Damages Under Washington State Law

The Plaintiffs are not eligible to receive double damages under RCW § 49.52.070, which provides that:

> Any employer and any officer, vice principal or agent of any employer who shall violate any of the provisions of subdivisions (1) and (2) of RCW 49.52.050 shall be liable in a civil action by the aggrieved employee or his assignee to judgment for twice the amount of the wages unlawfully rebated or withheld by way of exemplary damages, together with costs of suit and a reasonable sum for attorney's fees: PROVIDED, HOWEVER, That the benefits of this section shall not be available to any employee who has knowingly submitted to such violations.

Plaintiffs argued that an award of double damages pursuant to RCW § 49.52.070 was justified pursuant to RCW § 49.52.050(2), which provides in relevant part that:

> Any employer or officer, vice principal or agent of any employer, whether said employer be in private business or an elected public official, who
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> * * *
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> (2) Wilfully and with intent to deprive the employee of any part of his wages, shall pay any employee a lower wage than the wage such employer is obligated to pay such employee by any statute, ordinance, or contract;
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> * * *
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> Shall be guilty of a misdemeanor.

In short, the Plaintiffs argue that because the jury found that the Defendant willfully and intentionally violated federal and state anti-discrimination statutes, RCW § 49.52.050(2) was violated as a matter of law, entitling Plaintiffs double damages under RCW § 49.52 .070.

In interpreting state law, federal courts are bound by the pronouncements of the state's highest court. *Davis v. Metro Prods., Inc.,* 885 F.2d 515, 524 (9th Cir. 1989). If the particular issue has not been decided, federal courts must predict how the state's highest court would resolve it. *Dimidowich v. Bell & Howell,* 803 F.2d 1473, 1482 (9th Cir. 1986), *modified at* 810 F.2d 1517 (9th Cir. 1987). In making that prediction, federal courts look to existing state law without predicting potential changes in that law. *Moore v. R.G. Inds., Inc.,* 789 F.2d 1326, 1327 (9th Cir. 1986).

The Washington legislature enacted the statute at issue with a group of related provisions in 1939. *Ellerman v. Centerpoint Prepress, Inc.,* 22 P.3d 795, 798 (Wash. 2001)

(en banc). "Sometimes referred to as the 'Anti Kickback' statutes, they were enacted to prevent abuses by employers in a labor-management setting, e.g., coercing rebates from employees in order to circumvent collective bargaining agreements." *Id.*

Washington courts have not extended RCW § 49.52.050 to situations where employers violate anti-discrimination statutes. Rather, violations of § 49.52.050 have been upheld where an employer consciously withholds a quantifiable and undisputed amount of accrued pay. *See, e.g., Ellerman,* 22 P.3d at 798 (failure to pay wages); *Schilling v. Radio Holdings, Inc.*, 961 P.2d 371, 377 (Wash. 1998) (failure to issue regular paychecks).

The language of the statute does not support the expansive interpretation urged by the Plaintiffs. In ascertaining legislative intent, "the language at issue must be evaluated in the context of the entire statute." *Ellerman,* 22 P.3d at 798. The key word in the statute is "obligated." If the Washington legislature intended for the provision to apply to a situation such as Plaintiffs', it could have stated that any employer who violates any statute is subject to double damages. The insertion of the word "obligated" indicates a pre-existing duty imposed by contract or statute to pay specific compensation. Thus, a willful and intentional withholding of accrued pay legally owed the employee would subject the employer to double damages. Here, the Defendant's "obligation" to pay Plaintiffs the specific amount at issue had not legally accrued prior to the jury verdict. It did not stem from a "statute, ordinance, or contract;" rather, it resulted from a retrospective jury verdict.

Further, the Washington Supreme Court has not extended the reach of RCW § 49.52.050 to instances, such as the one at bar, in which there is a bona fide dispute as to whether the employer is obligated to pay the amounts in question. *Schilling*, 961 P.2d at 375. As the Washington Supreme Court put it in *Chelan County Deputy Sheriffs' Ass'n v. Chelan County*, 745 P.2d 1 (Wash. 1987):

> Pursuant to these provisions, double damages may be awarded for a willful withholding of wages due under a statute, ordinance, or contract. Nonpayment of wages is willful in this context when it is the result of knowing and intentional action and not the result of a bona fide dispute as to the obligation of payment.

Id. at 11.

Thus, the Plaintiffs were not entitled to double damages pursuant to RCW § 49.52.070.

CONCLUSION

We affirm the district court's admission of the plaintiffs' expert testimony and the district court's denial of Tidyman's' motion for a new trial. We also affirm the district court's ruling that the Title VII cap on compensatory and punitive damages does not apply to front pay awards or the Washington state law claims.

We reverse the district court's judgment as a matter of law that double damages were available to Lamphiear under the Washington statute, RCW 49.52.070. We also reverse the district court's judgment as a matter of law that punitive damages were not available in this case.

Finally, we uphold the constitutionality of the Title VII cap on compensatory and punitive damages.

Accordingly, we AFFIRM in part, REVERSE in part, and REMAND to the district court to reduce the back pay damages to Lamphiear, reinstate the punitive damage awards to Lamphiear and Hemmings, and apply the Title VII damages cap to the punitive damages awards.

Each side to bear its own costs on appeal.

PREGERSON, Circuit Judge, dissenting specially in part:

Because I believe that the district court correctly construed Washington state law to permit double damages in a discrimination suit where an employer willfully withholds wages, I respectfully dissent from Part IX.

I.

Double Damages are Recoverable Under State Law

In addition to violations of state and federal anti-discrimination laws, Plaintiffs alleged that Tidyman's violated a Washington statute prohibiting employers from willfully depriving employees of any wages due under statute, ordinance, or contract obligations. *See* RCW § 49.52.050.[1] Unlike the anti-discrimination claims,

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[1] Section 49.52.050 provides that "any employer . . . who . . . (2) willfully and with intent to deprive the employee of any part of his wages, shall pay any employee a lower wage than the wage such employer is obligated to pay such employee by any statute, ordinance, or contract" is guilty of a misdemeanor.

violation of the willful deprivation of wages statute requires the employer to pay the employee twice the amount of wages withheld ("double damages"). *See* RCW § 49.52.070.[2] Before the jury rendered its verdict, Tidyman's filed a motion seeking to strike the double damages claim by arguing that as a matter of law Washington's willful deprivation of wages statute is unavailable in discrimination cases. The district court ruled against Tidyman's, and the jury found that "Tidyman's willfully and with intent" deprived Lamphiear of part of her past wages because of her gender by paying Lamphiear less than she was entitled to receive.

The majority disagrees with the district court and concludes that: (1) the statutory scheme, RCW § 49.52.050 (the willful deprivation of wages statute) and RCW § 49.52.070 (the double damages provision) does not authorize a doubling of past lost wages for a discrimination victim; and (2) even if the statutory scheme applied, the doubling statute is inappropriate because a "bona fide dispute" existed over whether past wages were due, which is a recognized defense to the doubling statute. I disagree with both of these contentions.

The majority opinion concludes that the double damages provision is not available in cases, like this one, in which the employer failed to pay an equal wage in violation of anti-discrimination laws. Rather, the majority asserts that the double damages provision should only

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[2] Section 49.52.070 requires any employer in violation of § 49.52.050 (1)-(2) to pay the employee "twice the amount of the wages unlawfully rebated or withheld by way of exemplary damages."

apply in cases where the employer failed to pay an accrued wage that he was obligated to pay. The majority contends that the term "obligated" in § 49.52.050 precludes the application of the double damages provision in this case because Tidyman's had no "obligation" to pay the plaintiffs. The majority argues that the wages owed to the plaintiffs "did not stem from a 'statute, ordinance, or contract'; rather, it resulted from a retrospective jury verdict."

This conclusion ignores the plain terms of Washington state law. Washington law obligates employers to pay equal wages and compensate workers whose wages have been paid in a discriminatory manner. Section 49.12.175 of the RCW, which prohibits wage discrimination based on gender, provides that a female employee is "entitled to recover in a civil action the full amount of compensation that she would have received had she not been discriminated against." Thus, RCW § 49.12.175, read in conjunction with RCW § 49.52.050 and RCW § 49.52.070, establishes the right to double damages for wages withheld from Lamphiear on account of her gender.

Applying the state's double damages statute in cases like Lamphiear's, where wages are withheld because of employment discrimination, is consistent with the Supreme Court of Washington's interpretation of § 49.52.050, the state's willful deprivation of wages statute. In interpreting § 49.52.050, the Supreme Court of Washington held that the "*statute must be liberally construed* to advance the Legislature's intent to protect employee wages and assure payment." *Schilling,* 961 P.2d at 375 (emphasis supplied). Indeed, the Supreme Court of Washington has held that the "critical determination" in a double damages case under this section is "whether the

employer's failure to pay wages was 'willful.'" *Schilling,* 961 P.2d at 375. Because the failure to pay employees on an equal basis is clearly willful, double damages are appropriate in this case.

The case for applying § 49.52.070 to discrimination cases is further strengthened by Washington's anti-discrimination law. RCW § 49.60.020 provides that "the provisions of this chapter shall be construed liberally for the accomplishment of the purposes thereof." Contrary to the defendant's argument, nothing in either the Washington statutes or case law describes RCW § 49.60, the anti-discrimination statute, as an exclusive remedy. The failure to pay equal wages in violation of state and federal anti-discrimination laws may, therefore, fall within the type of conduct prohibited by RCW § 49.52.050.

The majority concludes in the alternative that, regardless of the reach of §§ 49.52.050 and 49.52.070, their application is inappropriate in this instance because Tidyman's qualifies for the "bona fide" dispute exception. This exception bars double damages in cases in which there is a bona fide dispute as to whether the employer is obligated to pay the amounts in question. *See Chelan County Deputy Sheriffs' Ass'n,* 745 P.2d at 11. While this is an accurate statement of the law in Washington, it is not appropriately applied in this instance. First, an employer's obligation to pay equal and comparable compensation among its male and female employees cannot be subject to a bona fide dispute. Second, in *Chelan County,* the Supreme Court of Washington held that the question whether the employer's actions were a "willful violation" or instead a response to a "bona fide dispute" is a factual question, appropriate for the jury. *Id.* at 11. *See also Pope v. Univ. of Washington*, 852 P.2d 1055, 1062 (Wash. 1994).

In the instant case, the jury found that Tidyman's' failure to pay the full wages due was the "result of knowing and intentional action of the employer." *See e.g., Brinson v. Linda Rose Joint Venture,* 53 F.3d 1044, 1049 (9th Cir. 1995). The jury's verdict thus forecloses Tidyman's' argument that its failure to pay adequate wages to Lamphiear was the result of a bona fide dispute.

Because applying double damages in this case is consistent with the remedial purposes of the Washington law and because there is no bona fide dispute as to Tidyman's' obligation to pay equal wages, I would affirm the district court's decision denying Tidyman's' motion to disallow double damages.

GOULD, Circuit Judge, Concurring in part and Dissenting in part:

I respectfully dissent from the majority's view in part IVC that the misconduct of plaintiffs' counsel during a part of closing argument by Ms. Price Sadich did not prejudice defendant. I would hold that counsel's statements that she had sued defendant before and that defendant's failure to change its practices after that prior suit "proves our case"[1] were so improper and inflammatory as

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[1] Counsel's statements were as follows:

> Unless you are a man starting in the night crew, you don't get ahead. That policy is what we object to. There is no business necessity for it. Now, could Tidyman's have fixed that policy? Easily. Write up objective criteria, write up job descriptions, . . . do job evaluations, . . . provide equal opportunity for people who apply for these positions. . . . They have not corrected any of these policies and they knew that

(Continued on following page)

to call the integrity of the proceeding into serious question and to violate due process.[2] Moreover, because I view those

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they should *because this is not the first time they have been sued. I have sued them before in 1994, so they had subjective policies which had a disparate impact on all women, including plaintiffs, and that proves our case because they did not have a business necessity for doing it, and there were ways to fix it.*

(Emphasis supplied.)

[2] Tidyman's also objects to statements during closing made by another of plaintiffs' counsel, Mr. Eymann. His challenged statements in argument included comparing a disciplinary meeting with Lamphiear to a "rape in the alley," suggesting that a female Board member on defendant's Board of Directors was a token woman, and insinuating that defendant's counsel had a female paralegal seated with them in order to give the impression of being fair to women. I consider all but the last of those statements to be within the realm of permissible rhetorical flourish. The jury could readily comprehend that Lamphiear was not actually raped and it could decide for itself whether to view the female Board member as a token. The rape argument is a metaphor supporting plaintiffs' case, and the characterization of the Board member as a token was merely argument favorable to plaintiffs' view of the evidence that was before the jury.

On the other hand, the characterization of a paralegal on the defense team in my view is off the mark of proper argument, which is to be directed at the evidence and issues for the jury relating to the parties' conduct, not the opposing party's legal team. But that reference was not sufficiently detrimental to warrant relief and was not so unfairly prejudicial as to violate due process. The jury could also assess the marginal import of a lawyer's characterization of opposing counsel or the opposing legal team.

But, as explained above, the closing argument of Ms. Price Sadich, suggesting that her prior suit against defendant proves the plaintiffs' case, is of a very different character. Counsel has a duty during argument to state the client's case in the most advantageous light based on the evidence that was admitted. There is nothing wrong with proper uses of rhetoric and persuasive skills to characterize evidence admitted at trial. But it is a wholly different thing, and entirely improper, for counsel to argue facts to the jury that were not admitted.

statements as fundamental error that in context was necessarily prejudicial, I would give relief for the improper argument and hold that the district court abused its discretion in failing to grant defendant's motion for a new trial on the basis of those improper statements.

Accordingly, I respectfully dissent from part IVC of the majority's opinion. However, because I agree with the majority's analysis of the other issues in the case and believe that, if a new trial were granted, it would be preferable to resolve those issues to guide the trial court, I concur in the majority's analysis with respect to parts I, II, III, IVA, IVB, V, VI, VII, VIII, and IX.

Because defense counsel did not object to counsel's statements during closing argument, we "review for plain or fundamental error, . . . where the integrity or fundamental fairness of the proceedings in the trial court is called into serious question." *Bird v. Glacier Elec. Coop., Inc.*, 255 F.3d 1136, 1148 (9th Cir. 2001). In *Bird,* we concluded that a closing argument in tribal court that characterized the dispute between an Indian-owned company and a non-Indian-owned company as racial in character violated due process and therefore precluded granting comity to the tribal court judgment. We reached that conclusion even though no objection was made to the closing argument in tribal court. *Id.* at 1152.

The egregiousness of counsel's misconduct here by arguing that counsel had sued Tidyman's for discrimination before and the potential prejudicial effect of that misconduct are similar to that which occurred in *Bird.* Here, counsel put herself in the role of a testifying witness *during the rebuttal portion of plaintiffs' closing argument*

and thereby flouted multiple procedural, evidentiary, and ethical constraints.

First of all, it is well-settled that the scope of closing argument must be limited to the evidence that was introduced in the case-in-chief; new evidence must not be introduced *during* closing argument. *See, e.g., United States v. Barron,* 575 F.2d 752, 758 (9th Cir. 1978). Counsel's description of the prior suit against Tidyman's went beyond the scope of any prior evidence submitted on that issue and was error.

Secondly, the law recognizes an entrenched proscription against counsel's testifying in a case which she is trying, absent limited exceptions not at issue here. Among other interests, this proscription serves to avoid undue prejudice resulting from the jury's attributing increased credibility to the statements of counsel because she is an officer of the court, and it prevents counsel from simultaneously subjecting herself to the conflicting roles of advocate and neutral witness. *See, e.g., United States v. Birdman,* 602 F.2d 547, 552-53 & 553 n.14 (9th Cir. 1979), and cases cited therein; *see also Hales v. Pittman,* 118 Ariz. 305, 576 P.2d 493, 502 (Ariz. 1978) ("A fundamental rule of American jurisprudence prohibits an attorney from testifying in a case he is handling."). Counsel was not sworn here, but, as in *Hales,* the argument in substance gave improper testimony.

Finally, in this case, much of the evidence referred to in closing argument regarding a prior discrimination suit against Tidyman's had already been excluded by the trial court *during* the case-in-chief. Thus, there should have been no question in counsel's mind that a discussion of that excluded evidence would be improper. *See Hales,* 576

P.2d at 501. Moreover, the allusion to a prior discrimination suit against Tidyman's in order to raise the inference that Tidyman's was acting in conformity with its prior conduct violated Rule 404(b), which generally prohibits the use of evidence of prior bad acts to show conduct in conformity therewith. *See* Fed. R. Evid. 404(b); *Becker v. ARCO Chem. Co.*, 207 F.3d 176, 194-203 (3d Cir. 2000).[3] If counsel had sought admission of the evidence during the case, rather than slipping it in *sub silentio* during closing argument, defense counsel could have raised a Rule 404(b) objection. If brought in evidence in the case-in-chief, the defense could have answered it with evidence. If identified as admissible, it might have been presented to the jury with a limiting instruction. Counter evidence might be presented or an argument might be fashioned to meet evidence that the court admitted. But none of that

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[3] Although evidence of prior discriminatory acts by employers may be admissible in rare and narrow circumstances in discrimination cases to show an employer's state of mind with respect to the protected class, *see Becker*, 207 F.3d at 194 n.8, it should be obvious to any competent lawyer that the proper avenue for presenting such evidence is to present the best case for its admission to the trial court during the case-in-chief. Here, the judge had excluded such evidence and it was not admitted. The tactic of counsel to add in argument what was not admitted in testimony is a fundamental error that cannot be countenanced. Counsel cannot properly argue facts to a jury that have not been admitted in evidence. To do so makes a mockery of all of the careful and time-tested procedures – the rules of civil procedure, the rules of evidence, and the rules of ethics, under which evidence is marshaled for trial, discovered by opposing parties, subjected to motions *in limine* and trial rulings, considered in formulating jury instructions, admitted or rejected by the trial court when offered, and finally, if admitted, considered by the trier of fact. All of this, with due process, goes out the window if counsel is permitted to add facts in closing argument that are not in the evidence.

happened. For when plaintiffs' counsel in rebuttal closing argument – virtually the last word to the jury from counsel – testified to and argued the fact of asserted prior discrimination against women, she denied Tidyman's its opportunity for a fair hearing and denied Tidyman's the due process to which it is entitled.[4] On this record, where discrimination was vigorously contested and much turned on characterizations and questions of degree, Tidyman's was necessarily prejudiced by the improper argument.

There is no question in my mind that counsel's outrageous behavior asserting prejudicial facts outside the record in the final moments of closing argument was very prejudicial. Although, as the majority points out, plaintiffs' counsel attempted to question Dr. Polissar, plaintiffs' statistical expert, about the prior suit against Tidyman's during its case-in-chief, the majority fails to accord due weight to the facts that defense counsel objected to that line of questioning *and the objection was sustained.* The majority glosses over the likely impact of the argument of previously excluded evidence. Because the objection was previously sustained, absent the improper comments during closing argument, the jury would have known that it was not to consider the evidence of a prior suit against

[4] Although defense counsel in theory could have objected to the statements during closing argument, that is easier said than done at trial. For doing so at that stage would have created considerable risk of losing credibility with a jury listening intently to each side's close, especially if the trial court did not sustain the objection, and perhaps even if objection was sustained. And under *Bird,* the failure to object does not wholly jettison the ground for relief if the argument to which no objection was made is so improper as to challenge the integrity or fundamental fairness of the proceeding.

Tidyman's, as testified to by Dr. Polissar. Moreover, the level of information about the prior suit divulged before defense counsel's objection was limited: it did not put the jury on notice of the nature of the plaintiff's claim,[5] it did not suggest that Dr. Polissar's analysis revealed statistically significant disparities, and it did not imply that the prior case alleged sex discrimination, nor did it imply that the prior discrimination case was resolved in favor of the plaintiffs.

The majority also relies on the fact that one of the plaintiffs, Hemmings, was asked on direct about prior lawsuits against Tidyman's. However, what the majority fails to acknowledge is that, like the testimony of Dr. Polissar, Hemmings' discussion of the lawsuits was limited. She noted that Tidyman's had been sued by two women and two men and that the women had sued the company for "discrimination."[6]

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[5] Although Dr. Polissar testified that the plaintiff was a woman, he did not testify that the case involved a sex discrimination claim. Women can be plaintiffs in any type of case, including all of the various types of discrimination cases; the fact that a woman had previously sued Tidyman's does not, by itself, raise an inference that a sex discrimination claim was involved.

[6] Although Hemmings also initially stated that the company had lost a discrimination lawsuit or lawsuits, that testimony was objected to on hearsay grounds, and the objection was sustained.

In context, Hemmings' allusion to the fact that the female plaintiffs had sued Tidyman's for discrimination does permit an inference that the plaintiffs in the prior case or cases sued for sex discrimination. However, unlike counsel's statement during closing argument, Hemmings' testimony did not imply that the practices or policies challenged by the prior plaintiffs were identical to those challenged by the current plaintiffs.

By contrast to the testimony in the case-in-chief, the unadmitted evidence slipped in during closing argument implied that the plaintiffs' claim in the prior suit was similar to the plaintiffs' claim here, involved the very same allegedly discriminatory policies, and was resolved favorably to the plaintiffs. It is axiomatic that the potential prejudicial effect of prior bad acts evidence increases with the degree of similarity between the charged act and the prior acts.[7] Moreover, the testimony by counsel that *she* had previously sued Tidyman's may have had more credibility in the eyes of the jury than that of the other witnesses because she is an officer of the court and would appear to the jury to be expert in the laws governing discrimination.

I am sorry to say that the apparent goals of the improper closing argument were transparent: 1) to make defendant's conduct seem more egregious because of its allegedly long-standing character and the fact that defendant was on notice of its wrongfulness, 2) to encourage the jury not to hold back in punishing defendant for that conduct, and 3) to encourage the jury to give the same type of "impassioned sanction" that was wrongly sought by improper argument in *Bird*. No evidence of similar scope had been admitted in the case-in-chief. Given the size of the jury verdict, it is probable that the jury took counsel's improper and unsubstantiated admonishments to heart. I

[7] This is so because the temptation to view the charged act as consistent with a defendant's prior conduct becomes stronger if the charged act is very similar to the prior conduct.

must respectfully dissent from the majority's conclusion to the contrary.[8]

[8] Doubtless the majority shies away from requiring a new trial consuming more than a week of judicial and litigant resources, without including preparation time, over a mistake in argument of a few seconds in closing. But the length of the improper argument is not the measure of its power to work injustice. It would be better to try the case again to ensure that the parties' dispute is resolved by fair procedure.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

CONNIE HEMMINGS; and PATTY LAMPHIEAR, Plaintiffs, -vs- TIDYMAN'S, INC., a Washington corporation, Defendant.	NO. CS-97-0068-WFN ORDER (Filed Aug. 20, 1999)

A post-trial motions hearing was held in this matter on June 30, 1999. Plaintiffs were represented by Shawn Price-Sladich and Richard Eymann; Defendant was represented by James Kalamon and Patrick Kirby. The Court reserved ruling on Plaintiffs' Motion for Injunctive Relief (Ct. Rec. 180), Plaintiffs' Motion for Attorneys Fees and for Costs (Ct. Rec. 182), Defendant's Renewed Motion for Judgment as a Matter of Law to Disallow Plaintiffs' Double Damages Claims, Punitive Damages Claims and Plaintiff Hemmings' Disparate Impact Claim (Ct. Rec. 185), Defendant's Motion to Alter or Amend Judgment in Lieu of New Trial (Ct. Rec. 191), and Defendant's Motion for New Trial (Ct. Rec. 197). The Court has read the file and the briefing, heard arguments of counsel and is fully informed.

BACKGROUND

A jury trial was held in this matter from March 22 through April 13, 1999. The jury returned a verdict in favor of Plaintiffs as follows on their federal and state claims:

For Plaintiff Connie Hemmings

$ 120,000	Lost Wages & Benefits (past)
1,580,000	Lost Future Earnings & Benefits
230,000	Non-Economic Damages
1,000,000	Punitive Damages (federal)
$2,930,000	

For Plaintiff Patty Lamphiear

$ 596,500	Lost Wages & Benefits (past – after $19,500 mitigation)
1,024,000	Lost Future Earnings & Benefits (after $775,000 mitigation)
650,000	Non-Economic Damages
1,000,000	Punitive Damages (federal)
$3,270,500	

The jury found against Plaintiff Hemmings on the following claims:

1. Disparate treatment discrimination for failing to promote Plaintiff Hemmings based on gender;

2. Payment of different compensation to Plaintiff Hemmings based on gender; and

3. Willful and intentional deprivation of any part of Plaintiff Hemmings' past wages or other compensation due to gender.

The jury found for Plaintiff Hemmings on the following claims:

1. Retaliation against Plaintiff Hemmings on the basis of gender;

2. Disparate impact discrimination for failing to promote Plaintiff Hemmings based on gender; and

3. Disparate impact discrimination for failing to provide greater pay and benefits to Plaintiff Hemmings on the basis of gender.

The jury found in favor of Plaintiff Lamphiear on all of her claims. Specifically, the jury found that the Defendant violated the law against disparate treatment discrimination by:

1. Not promoting Plaintiff Lamphiear on the basis of gender;

2. Retaliating against Plaintiff Lamphiear on the basis of gender;

3. Discharging Plaintiff Lamphiear on the basis of gender; and

4. Paying a different rate of compensation to Plaintiff Lamphiear on the basis of gender.

The jury also found that Defendant violated the law against disparate impact discrimination by:

1. Not promoting Plaintiff Lamphiear on the basis of gender; and

2. Not providing greater pay and benefits to Plaintiff Lamphiear on the basis of gender.

Lastly, the jury found that the Defendant willfully and with intent to deprive Plaintiff Lamphiear of any part of

her past wages or other compensation, paid Plaintiff Lamphiear a lower wage or compensation due to gender.

DEFENDANT'S RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW

Pursuant to Fed. R. Civ. P. 50(a), Defendant seeks judgment as a matter of law vacating the jury award of punitive damages to Plaintiffs Hemmings and Lamphiear, vacating the jury award of double damages to Plaintiff Lamphiear's state wage claim, and granting a directed verdict with respect to Plaintiff Hemmings' disparate impact claim. Defendant contends there is no legally sufficient evidentiary basis for any of these awards. Plaintiffs respond that ample legal and evidentiary bases existed for the jury's decisions. Further, Plaintiffs contend that Defendant failed to renew its motion for judgment as a matter of law regarding disparate impact and retaliation at the close of evidence, therefore waiving the right to renew the motion.

A Judgment as a matter of law may be granted pursuant to Fed. R. Civ. P. 50(a) which provides that

> [i]f during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.

FED. R. CIV. P. 50(a)(1). A party may renew a motion for judgment as a matter of law after trial as an alternative to a motion for new trial if

> for any reason, the court does not grant a motion for judgment as a matter of law made at the close of all the evidence, the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion.

FED. R. CIV. P. 50(b). After considering a renewed motion for judgment as a matter of law, the Court may "allow the judgment to stand, . . . order a new trial or . . . direct entry of judgment as a matter of law." FED. R. CIV. P. 50(b)(1)(A)-(C). A party may not assert additional grounds for relief under a renewed motion for judgment as a matter of law that were not first raised in the earlier motion for a directed verdict. 9A WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE § 2537 at 344.

The Court finds, as during trial, that Plaintiffs presented a legally sufficient evidentiary basis for the jury to find in favor of the Plaintiffs with the exception of the Plaintiffs' punitive damages claims. The jury was instructed on the heightened punitive damages standard required in gender discrimination claims. *Equal Employment Opportunity Commission v. Wal-Mart Stores Inc.*, 156 F.3d 989, 992 (9th Cir. 1998); *Ngo v. Reno Hilton Resort Corporation,* 140 F.3d 1299, 1301 (9th Cir. 1998). The jury instruction was as follows:

> Plaintiffs have the burden of proving that punitive damages should be awarded, and the amount, by a preponderance of the evidence. You may award punitive damages only if you find

> that Defendant's conduct was wilful and egregious or displayed a reckless indifference to the Plaintiffs' federal rights. Punitive damages may not be awarded, however, where a Defendant's discriminatory conduct is merely negligent in respect to the existence of a federally-protected right. Evidence of intentional discrimination beyond the level required for an award of compensatory damages is necessary to support an award of punitive damages. Plaintiffs must demonstrate that the Defendant almost certainly knew that what it was doing was wrongful and subject to punishment to be entitled to an award of punitive damages.

The Court, after considering the evidence presented during trial in a light most favorable to the Plaintiffs, finds that Plaintiffs did not present a legally sufficient evidentiary basis for a reasonable jury to find by a preponderance of the evidence that Defendant's conduct toward either Plaintiff was willful and egregious or displayed a reckless indifference to the Plaintiffs' federal rights sufficient to justify an award of punitive damages. Therefore, the jury's punitive damages award cannot stand. The Court wishes to note, however, that this decision is in no way meant to imply that the jury in this case was anything other than diligent and conscientious in the exercise of its duties.

DEFENDANT'S MOTION FOR NEW TRIAL

Pursuant to Fed. R. Civ. P. 59(a), Defendant seeks a new trial. Defendant presents a variety of arguments in support of its new trial motion. Generally, Defendants assert that the verdict was excessive, contrary to the law and the clear weight of the evidence, inconsistent on its

face with respect to Plaintiff Hemmings, and that both Plaintiffs' counsel presented improper argument to the jury. Plaintiffs contend that a new trial is unnecessary.

Fed. R. Civ. P. 59(a) provides that "[a] new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States. . . . " *Id.* The decision whether to grant a new trial is "confided almost entirely to the exercise of discretion on the part of the trial court." *Allied Chemical Corporation v. Daiflon, Inc.,* 449 U.S. 33, 36 (1980).

> The trial court may grant a new trial, even though the verdict is supported by substantial evidence, if "the verdict is contrary to the clear weight of the evidence, or is based upon evidence which is false, or to prevent, in the sound discretion of the trial judge, a miscarriage of justice."

Hanson v. Shell Oil Company, 541 F.2d 1352, 1359 (9th Cir. 1976) (*quoting, Moist Cold Refrigerator Co. v. Lou Johnson Co.,* 249 F.2d 246, 256 (9th Cir. 1957)). When considering a motion for new trial, the trial court must view the evidence in a light most favorable to the plaintiff. *Fenner v. Dependable Trucking Co., Inc.,* 716 F.2d 598, 603 (9th Cir. 1983).

Here, after considering the trial in a light most favorable to the Plaintiffs, the Court cannot say that the verdict was against the clear weight of the evidence or that a new trial is necessary to avoid a miscarriage of justice.

DEFENDANT'S MOTION TO ALTER OR AMEND JUDGMENT

Defendant, as an alternative to a new trial, seeks remittitur of the jury's damages awards contending that the awards were excessive in light of the evidence presented at the trial and that statutory caps under 42 U.S.C. § 1981a(a)(1) limit compensatory and punitive damages to $300,000 per Plaintiff under both federal and state law. Plaintiffs contend that the verdicts are not excessive and that the damages caps under 42 U.S.C. § 1981a limit only federal punitive damages to $300,000 per Plaintiff.

The trial court may overturn a damage award that is "grossly excessive, monstrous, or shocking to the conscience." *DeNieva v. Reyes,* 966 F.2d 480, 487 (9th Cir. 1992). If the trial court determines that a damages award is excessive, after reviewing the evidence in a light most favorable to the prevailing party, the Court may either grant a new trial or deny the new trial motion conditioned on the prevailing party's acceptance of a remittitur. *Fenner v. Dependable Trucking Co., Inc.,* 716 F.2d 598, 603 (9th Cir. 1983). "The prevailing party is given the option of either submitting to a new trial or of accepting a reduced amount of damage which the court considers justified." *Id.; see also, Minthorne v. Seeburg Corp.,* 397 F.2d 237, 244-45 (9th Cir. 1968).

The Civil Rights Act of 1991 as codified at 42 U.S.C. § 1981a provides that the

> sum of the amount of compensatory damages awarded under this section for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other non-pecuniary losses, and the amount of punitive damages awarded under this section,

> shall not exceed, for each complaining party – $300,000.

42 U.S.C. § 1981a(b)(3) (1998). The cap on compensatory damages and punitive damages under 42 U.S.C. § 1981a does not apply to the Plaintiffs' awards for past lost wages and benefits. "Compensatory damages awarded under this section shall not include back pay, interest on back pay, or any other type of relief authorized under § 706(g) of the Civil Rights Act of 1964 [42 U.S.C. § 2000e-5(g)]." 42 U.S.C. § 1981a(b)(2).

In *Passantino v. Johnson & Johnson Consumer Products, Inc.*, 982 F. Supp. 786 (WD Wash. 1997), a case quite similar to the instant case, a jury returned a verdict of $100,000 in back pay, $2 million in front pay and $1 million in mental and emotional distress after finding Defendant violated both federal and Washington state gender discrimination statutes. *Id.* at 787. The verdict form did not differentiate between the federal and state damages. *Id.* at 788. The jury also returned $8.6 million in punitive damages on the federal claims. *Id.* at 787.

The *Passantino* court applied 42 U.S.C. § 1981a(b)(3)(D) and reduced the punitive damages award to $300,000. *Id.* at 789. The Court determined that 42 U.S.C. § 1981a(b)(1)(D) had no effect on the state law damages, noting that the plaintiff was "clearly entitled to all of [the state law damages] under state law." *Id.* The Court then disallowed the compensatory damages award on the federal claims to avoid a double recovery since the damages for the state law and federal claims were for the same harm. *Id.* Ultimately, the Court awarded $3.4 million as follows: $3,100,000 state law compensatory damages and $300,000 federal punitive damages. *Id.*

The *Passantino* court specifically noted that "[t]he cap on federal damages found in 42 U.S.C. § 1981a(b)(3) is not unconstitutional and does not violate plaintiff's (or defendant's) right to a jury trial." *Id.* at 789. Further, the Court noted that "[a] plain reading of the statute indicates that plaintiff's recovery on her federal claim of retaliation for front pay, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses, and punitive damages, cannot exceed $300,000 . . . [and] this statutory cap does not offset any state law cause of action or damages." *Id.* at 788. The Court relied on *Kerr-Selgas v. American Airlines, Inc.*, 69 F.3d 1205 (1st Cir. 1995) wherein the First Circuit noted that the damages caps under 42 U.S.C. § 1981a(b) do not apply to state law discrimination claims because 42 U.S.C. § 2000e-7 does not relieve Defendants from state law liability. *Id.* at 1214.

The Defendant urges the Court to hold that the federal statutory caps apply to the state law compensatory damages awards because Washington state courts look to federal law to interpret the Washington state gender discrimination laws. *See, Goodman v. Boeing,* 75 Wash. App. 60, 77 (1994) ("in the absence of adequate state authority, federal authority is persuasive in interpreting R.C.W. 49.60"). However, this Court adopts the method implicitly utilized in *Passantino* and declines to apply the damages cap found in 42 U.S.C. § 1981a(b)(3)(D) to the instant state law damages. Absent some clear indication from Washington state courts that Washington law fully incorporates the damage cap of 42 U.S.C. § 1981a(b)(3)(D), imposing the cap on the state law compensatory awards is improper. Therefore, this Court will consider the compensatory damages awarded to both Plaintiffs as damages under state law and will not apply the federal damages

cap found in 42 U.S.C. § 1981a(b)(3)(D). Finally, this Court cannot say that the total resulting damages award is excessive or shocks the conscience when considered in a light most favorable to the Plaintiffs.

PLAINTIFFS' MOTION FOR INJUNCTIVE RELIEF

Plaintiffs seek injunctive relief, contending that Defendant engaged in discriminatory behavior which was sufficiently persistent, egregious, and systemic to warrant an affirmative action injunction. "[I]f the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate." Similarly, R.C.W. 49.60.030(2) provides "[a]ny person deeming himself or herself injured by any act in violation of this chapter shall have a civil action in a court of competent jurisdiction to enjoin further violations,. . . . " 42 U.S.C. § 2000e-5(g). Defendant claims that injunctive relief is inappropriate and unnecessary because any gender discrimination was isolated and therefore fails to constitute the type of egregious behavior which would warrant an injunction.

The Ninth Circuit has held that the trial Court should "look to several factors, including the necessity for the relief and the efficacy of alternative remedies; the flexibility and duration of the relief, including the availability of waiver provisions; the relationship of the numerical goals to the relevant labor market; and the impact of the relief on the rights of third parties." *Eldredge v. Carpenters 46 Northern CA Counties Joint Apprenticeship and Training,*

94 F.3d 1366, 1371 (9th Cir. 1996). Injunctive relief may be appropriate where the Defendant's discriminatory acts are persistent or egregious, or where necessary to dissipate the lingering effects of pervasive discrimination. In the instant case, while the jury found that Defendant discriminated against Plaintiffs, Plaintiffs offered little evidence that Defendant's conduct included other female employees. Female witnesses, employed by the Defendant, testified that they did not consider themselves victims of discrimination. Plaintiffs did not show that Defendant discriminated against any other employees based on their gender, indicating that gender based discrimination was neither pervasive, persistent, or egregious.

The Court must also consider the efficacy of alternative remedies. The jury awarded Plaintiff Lamphiear $2,270,500 and Plaintiff Hemmings $1,930,000 not including punitive damages. The Court necessarily must consider whether a combined award of $4,200,500 in damages levied against the Defendant will adequately deter the Defendant from future or continued discrimination on the basis of gender. Here, an award of such magnitude, coupled with intense public scrutiny, is a sufficient deterrent for the Defendant. Further, it is significant to the Court that only Plaintiff Hemmings remains employed with the Defendant and that the jury found against Plaintiff Hemmings on her disparate treatment claim.

If the damages award is a sufficient deterrent, then injunctive relief is not necessary or appropriate. *Sanchez v. Philip Morris Inc.*, 774 F. Supp. 626, 630-631 (W.D. Okla. 1991); *see also, Webb v. D.C.*, 146 F.3d 964, 976 (D.C. Cir. 1998) (stating that a "district court has broad discretion to fashion appropriate equitable relief for a Title VII plaintiff."); *Sledge, et al. v. J.P. Stevens, et al.*, 585 F.2d

625, 646-47 (4th Cir. 1978) (holding "where . . . effective relief can otherwise be afforded, or where . . . an employer . . . has made convincing and satisfactory progress toward the goal of equal hiring opportunity . . . it will ordinarily be unnecessary for the court to consider the prescription of quotas.").

PLAINTIFFS' MOTION FOR ATTORNEYS FEES AND COSTS

Plaintiffs' counsel seek fees and costs pursuant to 42 U.S.C. §§ 1988 and 2000e-5(k) and R.C.W. 49.60.030(2). Plaintiffs filed a Revised Consolidated Cost Affidavit on July 9, 1999. Defendant objects to the respective hourly rates sought by Plaintiffs' counsel and object to the majority of costs sought by Plaintiffs' counsel. Specifically, Plaintiffs counsel seek a total of $84,974.02 in costs plus attorneys' fees as follows:

ATTORNEY	NO. OF HOURS	HOURLY RATE
Richard Eymann	737.8	$300
Shawn Price-Sladich	1,905.4	$200
Steven Jones	24.8	$200
Robert Greer	4.3	$200
John Allison	12.1	$150

Additionally, counsel request that the Court apply a multiplier of 1.5 in consideration of the contingency fee nature of their representation.

Defendant objects to the hourly rates set by Plaintiffs' counsel but do not object to the total number of hours. Defendant contends a more appropriate hourly rate would be $150 for Attorney Sladich and $175 for Attorney Eymann.

There is no dispute that attorneys' fees and costs are available to Plaintiffs' counsel in this action. Further, there is no significant dispute as to the factors to consider when determining a reasonable fee. Factors to consider are: (1) the time and labor required; (2) the novelty and difficulty of the questions involved; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the undesirability of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. *Kerr v. Screen Extras Guild, Inc.,* 526 F.2d 67, 79 (9th Cir. 1975).

The lodestar amount is presumed to constitute a reasonable fee award. *United Steelworkers v. Phelps Dodge Corp.*, 896 F.2d 403, 406 (9th Cir. 1990). Upward adjustments to the lodestar amount are proper only in "'rare' and 'exceptional' cases." *Jordan v. Multnomah County,* 815 F.2d 1258, 1262 (9th Cir. 1987) (citations omitted).

After considering the nature of the case, the award obtained by Plaintiffs' counsel, the time expended by Plaintiffs' counsel, and the contingency fee arrangement

under which Plaintiffs' counsel provided their services, the Court determines that an appropriate hourly rate for:

(a) Attorney Eymann is $250 per hour;

(b) Attorney Price-Sladich is $150 per hour;

(c) Attorney Greer is $140 per hour;

(d) Attorney Allison is $125 per hour; and

(e) Attorney Jones is $140 per hour.

Further, the Court will apply a multiplier of 1.25 in recognition of the contingency nature of the attorneys' representation. *See, Bowers v. Transamerica Title Ins. Co.,* 100 Wash. 2d 581, 598 (1983).

The Court awards costs as follows. The Court adopts the Consolidated Cost Affidavit filed by Plaintiffs' counsel on July 9, 1999 (Ct. Rec. 275), with the exception of the deposition costs beginning on page 3, line 8, through page 5, line 9, and the professional legal services cost regarding affidavits in support of attorneys' fees found on page 8, lines 18-20. Additionally, the parties agree that the costs award must be offset by $1,500 with regard to a past medical examination. The Court notes that a more liberal recovery of costs is allowed in civil rights litigation. *Blair v. Washington State University,* 108 Wash. 2d 558, 573 (1987). Therefore, the Court will award $62,638.16 in costs after the deductions noted above and attorneys' fees as set out below. Accordingly,

IT IS ORDERED that:

1. Plaintiffs' Motion for Injunctive Relief, **Ct. Rec. 180, IS DENIED**.

2. Plaintiffs' Motion for Attorneys Fees and for Costs, **Ct. Rec. 182,** is **GRANTED**. Fees are granted in the following amounts:

ATTORNEY	HOURS @ HOURLY RATE	1.25 MULTIPLIER	TOTAL FEES
Richard Eymann	737.8 @ $250	X 1.25	$230,562.50
Shawn Price-Sladich	1,905.4 @ $150	X 1.25	$357,262.50
Steven Jones	24.8 @ $140	X 1.25	$ 4,340.00
Robert Greer	4.3 @ $140	X 1.25	$ 752.50
John Allison	12.1 @ $125	X 1.25	$ 1,890.63

Costs are awarded in the amount of $62,638.16 as indicated on the previous page, lines 4-14.

3. Defendant's Renewed Motion for Judgment as a Matter of Law to Disallow Plaintiffs' Double Damages Claims, Punitive Damages Claims and Plaintiff Hemmings' Disparate Impact Claim, **Ct. Rec. 185, IS GRANTED IN PART and DENIED IN PART** as follows:

(a) Defendant's Renewed Motion for Judgment as a Matter of law regarding punitive damages **IS GRANTED**. Plaintiff Hemmings' and Plaintiff Lamphiear's award of punitive damages in the amount of $1,000,000.00 each **IS VACATED** for the reasons stated above and during trial;

(b) Defendant's Renewed Motion for Judgment as a Matter of law regarding the award of double damages to Plaintiff Lamphiear **IS DENIED**; and

(c) Defendant's Renewed Motion for Judgment as a Matter of law regarding Plaintiff Hemmings' disparate impact claim **IS DENIED**.

4. Defendant's Motion to Alter or Amend Judgment in Lieu of New Trial, **Ct. Rec. 191, IS DENIED**.

5. Defendant's Motion for New Trial, **Ct. Rec. 197, IS DENIED**.

The District Court Executive is directed to file this Order and provide copies to counsel.

DATED this 20 day of August, 1999.

/s/ Wm. F. Nielsen
WM. FREMMING NIELSEN
CHIEF UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

CONNIE HEMMINGS; and PATTY LAMPHIER, [sic]	No. CS-97-0068-WFN
Plaintiff(s),	**AMENDED JUDGMENT IN A CIVIL CASE**
vs.	
TIDYMAN'S, INC., a Washington Corp.	(Filed Aug. 31, 1999)
Defendant(s),	

This action came to trial before the Court. The issues have been tried and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that

1. Judgment is amended reflecting the rulings of the Court in order issued 8/20/99.

2. Plaintiff's Motion for Attorneys fees and costs are granted. Fees are granted in the following amounts;

Richard Eymann	$230,562.50
Shawn Price-Sladich	$357,262.50
Steven Jones	$ 4,340.00
Robert Greer	$ 752.50
John Allison	$ 1,890.63

3. Costs are awarded in the amount of $62,638.16 as indicated in the order of 8/20/99.

4. Plaintiff Hemmings' and Plaintiff Lamphiear's award of punitive damages in the amount of $1,000,000.00 each is vacated.

DATED: August 31, 1999

JAMES R. LARSEN, CLERK

by /s/ Kelly Howard
Kelly Howard, Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

CONNIE HEMMINGS and PATTY LAMPHIEAR, Plaintiffs, Vs. TIDYMAN'S, INC., Defendant.	No. CS 97-068-WFN June 30, 1999 Spokane, Washington Transcript of: Post Trial Motions

BEFORE THE HONORABLE
WILLIAM FREMMING NIELSEN

* * *

[3] (Wednesday, June 30, 1999; 8:30 a.m., in open court)

COURT CLERK: In the case of Connie Hemmings and Patty Lamphiear versus Tidyman's, Inc., cause number CS 97 dash 68, time set for post trial motions.

THE COURT: Well, there is a lot of paper that has been generated in this case. A lot of motions and good briefing and supporting affidavits, but we are anxious to hear oral discussion on a number of these issues and I think probably, Mr. Kalamon, your motion to alter or amend the judgment and motions for new trial and judgment as a matter of law logically should lead off as a group of motions, unless, Mr. Eymann, Miss Sladich feel that your motion should go first?

MR. EYMANN: No, Your Honor. Your method is quite acceptable.

THE COURT: Say again, sir?

MR. EYMANN: Your method is quite acceptable.

MR. KALAMON: May it please the Court, I am here on behalf of Tidyman's to urge the Court for a new trial. I realize that this is rarely done, but in this instance, Your Honor, we submit that there is compelling reasons for it.

It is the only way to avoid what we perceive as a miscarriage of justice here. The verdict shocks the conscience, it is contrary to the evidence for reasons I will go into, and therefore, obviously a result of passion,

* * *

[10] they have Christine Schnug. She is on the board of directors and sits on the meetings. Did she come into trial and testify? No. That is because she is just a token women that they have put on at that level."

Now, Christine Schnug is a partner of Moss Adams. She has been president of the Spokane Chamber of Commerce and I submit, that is outrageous to characterize her as a token woman on the board of directors of Tidyman's.

Again, just done to inflame the jury. And, "Excuse me," Mr. Eymann says, "this is probably offensive to defense counsel" which he is right, it is, "but at the same time as having a paralegal who is a woman sitting at the defense counsel, so there is not just a man sitting there."

Again, what does this have to do with explaining the evidence? What does this have to do with helping the jury understand the testimony?

It has nothing to do with it. It reflects on me, reflects on my counsel, reflects on Rose Mary Peterson who has been in this business longer than I have and is absolutely inappropriate. The goal is to provoke the passions and prejudices and they succeeded.

Then we have attorney Sladich who indicates during her closing arguments that oh, by the way, I have sued them before in 1994. Again, totally inappropriate. Totally designed to impact the passions and prejudice.

[11] Now, I did not object to those questions (sic), that is absolutely true, but I didn't have –

THE COURT: Did I not interject a reference at that point and said that was improper?

MR. KALAMON: No.

THE COURT: I can't remember.

MR. KALAMON: No, there wasn't any. And there are cases that are clear on this that I didn't have to object to that kind of impropriety.

The San Antonio versus Timko case, Second Circuit, impropriety of argument can be so flagrant as to cause fundamental error although defense counsel did not take exception.

In this situation, there is a statement. Am I going to make an objection and bring attention to it again and then have the Court instruct on it and bring attention to it the third time? Absolutely not.

It is exactly what happened here. The comments were so flagrant and inappropriate that we were denied a fair trial. As stated in O'Rear versus Fruehauf, Fifth Circuit, 1997, "You can throw a skunk into the jury box and instruct the jurors not to smell it, but it doesn't do any good."

And that is exactly here, Judge. There was absolutely nothing that could be done by my objection or the Court's correcting instruction.

* * *

[38] and so you will have the cite, the court said, "We have not previously decided whether a reference during a trial" – and this is speaking to the comments that Shawn Sladich apparently made that came out in the testimony of Mr. Polissar when asked a question – I don't remember whether it was asked by her or was asked by defense counsel, but he said, "Well, I had already done this work before with regard to a prior case involving Tidyman's back in 1994."

So that essentially was in response to a question I remember. I don't think it was elicited by any counsel in the case, but it was something that Mr. Polissar threw out that he had previously been working for Miss Sladich and had in a case involving the very same issues in this particular case.

So it wasn't evidence. It was not something that she just, you know, brought out in final argument, but let's assume that she shouldn't have brought that out in final argument, in the case of Abramson versus American Pacific Corporation, in that case the lawyer in final argument brought out an SEC enforcement proceeding

that had not been in evidence, and the court said that when an appellate court ponders a probable affect on an error in a civil trial, it need only find that the jury's verdict is more probably than not untainted by the error.

They went on to say that we have refused to find reversible error where conceivably improper remarks were made, but not [39] repeated during a closing argument, then they go on to cite three or four more cases where improper argument with regard to some other proceeding that was going on is not error and it is not a grounds to throw out a verdict.

In that court, they simply found that the reference to a separate ongoing SEC proceeding which had not been in the evidence was harmless, and that is their exact words. After discussing it, they say it is highly improbable that it had any affect on this verdict. It was harmless.

THE COURT: I remember the comment and I thought I sua sponte corrected it, but maybe I just thought about it and would have sustained an objection had one been made because it was totally improper.

MR. EYMANN: But there never was any objection, Your Honor.

THE COURT: No, I agree with that.

MR. EYMANN: and there was never any motion for a mistrial and there was no motion for an instruction to the jury to disregard anything, and I think under the case law that has already been laid out, you cannot, whether strategy or not strategy, simply not object.

The final argument, in the heat of the argument, that may have been said and it may, as you have pointed out, been improper, but there was certainly the chance to correct it and you can't sit silently and let it go past until the case is

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United States District Court

EASTERN DISTRICT OF WASHINGTON

CONNIE HEMMINGS

(AMENDED) **JUDGMENT IN A CIVIL CASE**

V.

TIDYMAN'S, INC. CASE NUMBER: CS-97-068 WFN
(Filed Apr. 15, 1999)

☒ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☐ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that the plaintiff Connie Hemmings recover of the defendant Tidyman's, Inc. the sums of $120,000.00 in past lost wages and benefits, $1,580,000.00 in future lost earnings and benefits, $230,000.00 in non-economic damages and $1,000,000.00 in punitive damages, with interest at the rate of 4.732 per cent as provided by law, and her costs of action.

April 15, 1999
Date

James R. Larsen
Clerk

/s/ David A. Naccarato
(By) Deputy Clerk

United States District Court

EASTERN DISTRICT OF WASHINGTON

PATTY LAMPHIEAR

(AMENDED) **JUDGMENT IN A CIVIL CASE**

V.

TIDYMAN'S, INC. CASE NUMBER: CS-97-068 WFN
(Filed Apr. 15, 1999)

☒ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☐ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that the plaintiff Patty Lamphiear recover of the defendant Tidyman's, Inc. the sums of $596,500,00 [sic] in past lost wages and benefits, $1,024,000.00 in future lost earnings and benefits, $650,000.00 in non-economic damages and $1,000,000.00 in punitive damages, with interest at the rate of 4.732 per cent as provided by law, and her cost of action.

April 15, 1999
Date

James R. Larsen
Clerk

/s/ David A. Naccarato
(By) Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

CONNIE HEMMINGS and PATTY LAMPHIEAR, Plaintiffs, vs. TIDYMAN'S, INC., Defendant.	No. CS 97-068-WFN March 22nd – April 13th, 1999 Spokane, Washington Transcript of Pretrial Jury Trial Motions (March 22, 1999)

BEFORE THE HONORABLE
WILLIAM FREMMING NIELSEN

* * *

[26] think you need them, but we will move that monitor out about where the easel is and then this monitor will be moved up.

Don't we – move it up a little closer I think, Mr. Goeke, so the jury can see either of those very clearly.

MR. KALAMON: Didn't mean to experiment.

THE COURT: No, you should. It is a time-saver when you get on to it. Is there anything further?

MR. KALAMON: Yes, Your Honor, there is one thing. I just wanted to renew my objection to the male/female composition of the manager and assistant managers in the store.

I realize the Court has ruled on that and I don't mean to rehash that issue. I just bring it up now to incorporate our briefs and argument that we had on March 12th and our motion in limine just to preserve and also ask for a

continuing objection to any testimony along that line so I don't have to interrupt the Court and the jury.

THE COURT: Yeah, you have an objection – a continuing objection. If there is something new that comes up, a new twist or something though, it is up to you to bring that to the Court's attention, because I may not pick up on it if it is something that would go beyond that objection that you have had.

MR. KALAMON: Yes, Your Honor.

THE COURT: There was something else that I was going [27] to mention. I can't think of it. Is there anything else?

MR. EYMANN: So I understand it then, based upon the prior ruling and the comments that you just made, the male/female composition of this particular corporation is – it is obviously disputed, but that will be brought in through the cases that each side would put them on, and they will have their respective views and they will either rise or fall based upon the evidence that they put on?

THE COURT: You are talking now about the statistical type evidence, Mr. Eymann?

MR. EYMANN: Not exact statistical evidence, but with regard to men at the top and women in the middle, that sort of thing?

I think it, generally speaking, is what I am saying that that obviously goes to the issue of promotions, goes to the very substance of the whole entire case.

THE COURT: Seems to me if you are contending that there is an ongoing sort of a corporate culture that is anti female gender, that it would be hard for the Court to exclude that in a gender discrimination case.

MR. KALAMON: Your Honor, just for clarification, we weren't suggesting that the Court should exclude that in all respects.

We were contending in our motion that the Court should not allow any evidence with respect to the stores. That was the [28] focus of that.

THE COURT: Okay. And that is because it is, what, management leveled [sic] salaried employees versus lower level hourly employees?

MR. KALAMON: Because of the fact that these two plaintiffs were working in the corporate area. They had not worked in the stores.

They had not been department heads, assistant managers, managers and that type of male/female composition I sought to exclude, which the Court has indicated that we will take that testimony unless there is something – some surprise.

THE COURT: Yeah, same ruling.

MR. KALAMON: Thank you.

THE COURT: Yeah, I think I mentioned in the pretrial conference that we had a week ago, that I really disfavor bench conferences or ever excusing the jury.

If matters come up, change the subject, we will go on to another one, pick it up at a recess or in the morning. I will come down real early in the morning, or I will work at

night, but if that jury is kept in the box listening to about six and a half hours testimony a day, we will get through this case.

If we are running up to the bench all of the time, we never will. So we are not going to run up to the bench or excuse the jury.

We will start at 8:30 in the morning. The recesses will be

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

CONNIE HEMMINGS and PATTY LAMPHIEAR, Plaintiffs, vs. TIDYMAN'S, INC., Defendant.	No. CS 97-068-WFN March 22nd – April 13th, 1999 Spokane, Washington Transcript of Jury Trial Proceedings Volume 1 (March 23, 1999)

BEFORE THE HONORABLE
WILLIAM FREMMING NIELSEN

* * *

Jim, move that, that thing is right in the way. Move it up closer so that they can get around it easier and they can see it better.

(Jury now brought in at 8:35 a.m., for the following record:)

THE COURT: Good morning, everybody. Ready to proceed with the plaintiffs' case?

MS. PRICE-SLADICH: Yes, Your Honor.

THE COURT: Miss Price-Sladich, call your first witness.

MS. PRICE-SLADICH: Plaintiff calls Connie Hemmings.

(WITNESS, CONNIE HEMMINGS, called as a witness on behalf of the plaintiffs, having been first duly sworn by the Court, was examined and testified as follows:)

THE COURT: You may proceed, Miss Sladich.

DIRECT EXAMINATION

BY MS. PRICE-SLADICH:

Q Could you please state and spell your name for the record?

A My name is Connie, C-o-n-n-i-e, Marie, M-a-r-i-e, Hemmings, H-e-m-m-i-n-g-s.

Q What is your birth date?

A My birth date is December 16th, 1949.

Q And how old are you?

A I am 49 years old.

Q Are you married?

* * *

[68] back to work and work within those guides. I don't recall any other ones right now.

Q Okay. Then you also testified that you had some conversation with Jim – I am sorry, Jim Armstrong. What was your conversations with Mr. – I am sorry, what was Mr. Armstrong's job title at the time you had these conversations?

A Mr. Armstrong's job title is the director of loss prevention or risk management –

Q And when – sorry.

A – and the discussions that I had with him were that we had been sued before and we lost and we need to get women in management positions.

MR. KALAMON: Objection, Your Honor, hearsay for anything other than what this witness told Mr. Armstrong.

THE COURT: I thought that is what that was. If I am wrong, I will sustain the objection.

MS. PRICE-SLADICH: It is, but it is also Mr. Armstrong –

MR. KALAMON: Objection, Your Honor.

MS. PRICE-SLADICH: Mr. Armstrong is a –

THE COURT: What was his title?

MS. PRICE-SLADICH: He was the director of loss prevention, risk management.

MR. KALAMON: It has nothing to do with human resources. He does not hire or fire or any of that sort of [69] thing, or with respect to forming policy for human resources either.

He is in charge of making sure that when people slip in the stores and have that type litigation damage.

THE COURT: I will sustain that objection. It doesn't appear as though that he would come under 801(d)(2) as the speaking agent on that subject.

Q Okay. Connie, what was your part of the conversation with Mr. Armstrong?

A That we needed to get more management – women in management positions to prevent getting continually sued.

Q And you indicated that the company has been sued before. Do you know who had sued the company; were they women?

A There were two women and one – actually two guys that I know of.

Q When you had this conversation with Mr. Armstrong, when was that?

A Oh, we have talked about that periodically all of the way up to 1996 and I think probably Jim came around 92, I am not sure what his date was.

Q And the two women who sued the company, when was that?

A That was in the '92, '93, '94 time frame.

Q And did those women sue the company for discrimination?

A Yes.

Q Were there any other conversations that you were present

* * *

testimony to the jury today?

A When they got rid of my position, which is still active as a full-time position.

Q And you are saying that they eliminated your position as a sham; this whole SuperValu deal was a big sham just so they could make sure that you no longer worked at Tidyman's?

A That is correct.

MR. KALAMON: I have no more questions, Your Honor.

THE COURT: Thank you, Miss Lamphiear, you may step down.

MR. EYMANN: We would call Ron Bashaw.

(WITNESS, RON BASHAW, called as a witness on behalf of the plaintiff, having been first duly sworn by the Court, was examined and testified as follows:)

DIRECT EXAMINATION

BY MR. EYMANN:

Q Sir, could you state your name for the record?

A Ron Bashaw.

Q And your address, sir?

A It is 2603 Tower Lane, Tacoma, Washington.

COURT CLERK: You might have him spell his last name, counsel?

A Bashaw, B, as in boy, a-s-h-a-w.

Q Sir, where did you grow up?

A Moscow, Idaho.

* * *

[94] Bashaw/Cross

A Venting.

Q Patty Lamphiear would have personality conflicts with people she worked with, isn't that right?

A Not that I am aware of.

Q Patty Lamphiear had a personality conflict with Rhonda Ketron, isn't that right?

A I think everybody had a personality conflict with Rhonda Ketron once in a while.

Q So it was okay to have a personality conflict with Rhonda Ketron, is that what you are saying?

A I think everybody did at one point in time.

Q Now, Mr. Bashaw, you testified earlier that as the number two man at Tidyman's, you would often sit down with the number one man, Mr. Jack Heuston, and discuss salary adjustments every year, isn't that right?

A Yes, sir.

Q And every time you and Mr. Heuston did that, you would review labor market research that had been sent to Mr. Heuston, isn't that right?

A That is true.

Q And Mr. Heuston and you would discuss the salary adjustment based upon the labor market research and the individual employee's job performance, isn't that right, Mr. Bashaw?

A Yes, sir.

Q And during the entire time you were doing that with Mr. [95] Heuston, there was never a single occasion where you suspected or believed that Mr. Heuston was considering a person's sex in making these adjustments, isn't that right, Mr. Bashaw?

A Yes, sir.

Q Not a single instance?

A No.

Q Mr. Bashaw, isn't it true that when you are discussing these salary adjustments for Patty Lamphiear, that he took every single one of your recommendations, isn't that right, until the last one, isn't that right, Mr. Bashaw?

A Yes, sir.

Q And on the last occasion, you proposed to raise him – to raise Patty Lamphiear's salary and he suggested that in his mind it would be more fair to her and the company to put her on an incentive program and give her a bonus, isn't that right?

A Rather than continuing to raise her wages, yes, sir.

Q And you had no reason to believe that Mr. Heuston considered Patty Lamphiear's sex when he made that proposal, did you?

A Yes, sir.

Q You had no reason to believe that he was considering Patty Lamphiear's sex; so if she was a man, as far as you know, Mr. Heuston would have made the same decision?

A I believe so.

Q And prior to this bonus plan system and incentive system, [96] Patty Lamphiear was not collecting bonuses, was she?

A Not that I am aware of.

Q And meanwhile, her experience and training is increasing, isn't it, Mr. Bashaw?

A Yes, sir.

Q As a matter of fact, you sent her to MAPS training, didn't you, Mr. Bashaw?

A Yes, sir.

Q And MAPS training was a three day seminar at Snoqualmie Falls to teach employees on management and leadership and communication skills to improve their ability to advance their careers, isn't that right, Mr. Bashaw; isn't that why you sent Mrs. Lamphiear?

A We sent the entire management staff through it.

Q Isn't that right, Mr. Bashaw?

A Yes, sir.

Q And you sent the entire management staff, so that would include Karen Riba, isn't that right?

A Yes, sir.

Q Patty Kilcup, isn't that right?

A Yes, sir.

Q You were general manager for Tidyman's from 1988 until '92; isn't that correct, Mr. Bashaw?

A Yes, sir.

Q And after you left your position as general manager of

* * *

[115] Bashaw/Redirect

Q You were asked a question about trying to get women into management positions. Did you ever attempt to get Malinda Osborne into a management position or have some part in an attempt to do that?

A I don't recall.

Q Do you know who Malinda Osborne was?

A Right off the top of my head, no.

MR. KIRBY: Objection, Your Honor, this is all ãntidotal testimony. These are about separate employees. Different set of circumstances.

THE COURT: Well, he said he didn't know who Miss Osborne was.

MR. EYMANN: I think that ended it right there for me.

THE COURT: Yeah, not much more you can ask him about that one. Say, it just occurred to me, I want to remind members of the jury, if any of you want a drink of water, Mr. Goeke has not the water and cups. Just kind of let him know and he will pass it down to you.

Q You were asked about your friendship with these two women here. Has it been over a year that you ever – that you talked with Patty Lamphiear until today?

A Yes, sir.

Q Over a year?

A Over a year.

Q And has it been approximately 10 months since you spoke

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[121] Polissar/Direct

Hemmings on the basis of her sex?"

Answer, "No."

Question, "With respect to Patty Lamphiear, you testified earlier that you did not believe her sex played a role in setting her wages, her salary, or her benefits, is that right?"

Answer, "Right."

Question, "Do you have any reason to believe or conclude that Patty Lamphiear's sex played a role in the

terms and the conditions of employment she enjoyed at Tidyman's such as training opportunities, advancement opportunities, benefits, allowances, any of those matters; were any of those matters influenced by her sex at Tidyman's?"

Answer, "No."

MR. EYMANN: I don't think I dare ask.

THE COURT: No, that is it. Thank you, Bashaw.

MS. PRICE-SLADICH: Your Honor, the plaintiff calls Nayak Polissar.

(WITNESS, NAYAK POLISSAR, called as a witness on behalf of the plaintiff, having been first duly sworn by the Court, was examined and testified as follows:)

DIRECT EXAMINATION

BY MS. PRICE-SLALDICH:

Q Could you please state and spell your name for the record?

[122] A Sure, first name is Nayak, that is N, as in Norman, a-y-a-k. Last name is Polissar, P, as in Peter, o-l-i-s-s-a-r.

Q And what is your business address?

A 1827 23rd Avenue East, Seattle, Washington 98112-2913.

Q And what is your educational background starting with undergraduate study?

A I have a Bachelor's Degree in mathematics from the University of California in Berkeley, a Master's Degree in statistics from Princeton University, and a Ph.D., doctoral degree in statistics from Princeton University.

Q And when did you graduate with your undergraduate degree?

A In 1966.

Q And when did you graduate with your statistical degree?

A Master's Degree in '68 and Ph.D., in '74.

Q And can you please describe your employment history within your field of expertise?

A Sure, while in graduate school, I was in Thailand for three years teaching demography and population studies at Chula Long Core (phonetic) University and worked on population surveys and other issues there.

Then at Princeton University, I was a research assistant. I helped professors on their research. Then after receiving a doctor's degree, I came to the wonderful west to Seattle to the University of Washington as a professor at the University of Washington for 15 years, and in the Department of Biostatistics

* * *

[126] plaintiff. Second one was for the plaintiff. Third was for the defendant. Fourth was for the plaintiff, and fifth for the plaintiff so that is it.

Q So three times for the plaintiff, twice for the defendant?

A Right.

Q Okay. And have you testified as an expert or provided expert analyses in cases that didn't wind up going all of the way to court?

A Yes, that was settled out of court, I did.

Q How many of those are there?

A Well, okay. Let's see, one, two, three, four, five, six, seven.

Q And of these seven that you did not – you were hired but did not wind up testifying in court, how many times did you represent the plaintiff and how many times did you represent the defendant?

A All right. Let's go down here. Let's see, the defendant, the defendant, the plaintiff, the defendant and the defendant.

Q So four times for the defendant and once for the plaintiff. Have you ever – have you and I ever worked together before?

A Yes, we have on one other case.

Q And what case was that?

A That was a case – a lawsuit against Tidyman's and you were representing the plaintiff and you asked me to help out on [127] that.

Q And was our plaintiff a woman?

A Yes.

Q And what were you analyzing?

A Well, at that point –

MR. KALAMON: Objection, Your Honor, that is not this case.

THE COURT: I will sustain the objection. That is enough.

Q Did you wind up testifying for the plaintiff in the case where you and I worked together before?

A No.

Q Okay. Can you describe for me how statistical analyses works?

A Why not.

Q Try.

A Okay. Well, there is several key things that happen in statistics. One is to describe what the numbers are saying with summary figures like an average or a percentage.

So a certain percentage of men and women are dong this or that or an average salary, for example.

And another concept which is – needs some explanation which is more difficult for most people is a term statistical significance.

In making comparisons, you usually want to see if two

* * *

[130] The sun is really noisy and has a lot of radio noise. If you look at the signal, it is going to be all over the place. So they bounced – they sent their radar signals to the sun and they received – they recorded during the

period when they expected those signals to come back, and they sent them in a pattern, a specific pattern that they knew.

So when they got the signal back, if you just look at the data, it was really quite noisy, it looked all over the place, but by using statistical analyses and taking average over short periods of time, they were able to detect that this pattern was appearing with a lot of noise added on top of it.

So the pattern was there, and it was a statistically significant difference in what you would expect if you just had pure noise.

So they were able to show that they received their signals back from the sun, and it was statistically significant. And also I have given you a –

Q We need to reserve on the other example at this moment.

A Right.

Q Can you explain to me what the source of the data was that you used for the analysis in this case?

A Yes, we received some printed listings from Tidyman's, Incorporated. You received them from them and supplied them to me, and this is an example of them.

If you could move it down so we can see the heading. I [131] will tell you what, could you, Miss Sladich, could you move it over so – the other way, if you don't mind, and maybe blow it up a little bit.

MR. KALAMON: Your Honor, I have an objection, Your Honor.

THE COURT: Just a minute, go ahead.

MR. KALAMON: The exhibit that we are looking at has not been presented to us.

MS. PRICE-SLADICH: Yes, this was part of his deposition. This is part of the material that was received from Tidyman's, and it is part of –

MR. KALAMON: I am sorry, I thought it was –

THE COURT: Go ahead, Miss Price-Sladich.

MR. KALAMON: Pardon me.

A I would like to be able for the Judge and jurors to see and everybody else is to see the headings if they could there. If not –

THE COURT: Expand the headings and I think you wanted to see, professor, the left margin, more to the left of it?

THE WITNESS: Yes.

Q My left or the document's left?

A I think I can describe what is there. I need – let's see. This is how this works, right? Okay. These are the pages that we received from Tidyman's in physical hard copy, not electronic format, and it is information about their [132] management employees.

They sent us these pages and we scanned them into a computer. You know, we can scan pages, then we checked them over and developed an electronic data base to work with this.

So there is a few key columns that I would like to point out. One is here is the gender right there. Okay. Thank you. There is the gender. Male or female.

Then there is the name of the employee, and this is the date they were hired as well, right here. Let's see, right – that is the hire date, okay, and then if they were terminated, this is the termination date here. This is kind of fun. All right.

Q I am glad you are having fun.

A Okay. And then I am not going to go over columns that we didn't use. Each person has several records on the data base. We can go over that part here, but here looks like Marty Goucher (phonetic).

You see Marty Goucher appears quite a few different times. So during the period that this data base covered, any kind of transaction for Marty would be here. So if he got a pay raise, or if he or she was terminated, there would be a record for Marty there.

We can go off to the right a little bit now. That is good. And this is the date – right there is the date of the transaction called hours effective date, HR effective date, and [133] then there is a code for what type of transaction it was.

A promotion or a rate change, and there is a job code for the position that the person held. Wow, this is wild. There is a job code.

And Tidyman's also supplied names for those job codes so we know what each job that a person had and off to the left, I don't think we need to go back to it, there is

also a department code to tell which department they worked in.

So really you got to find out quite a few things about what people were doing there, and if you keep going to the right if you would – oh, one thing here.

Employee's status, this one tells whether they are an hourly or salaried employee, and if you go all of the way to the right please, then this is their salary that was effective on the date of that particular transaction. So you get a salary history.

And what we will be presenting today is almost exclusively dealing with their first record and their last record. That is, what was their salary or position when they started and what was their salary and position at the end of this data base period.

The data base covers the transactions during the period November 1st, 1995 to October 8th, 1998. And in November, 1995, I believe that this data base was established, so a lot of people have a transaction on that date, which is saying that [134] here they are appearing in the data base for the first time. It is not necessarily date of hire.

So we scanned this, and we checked the heck out of it. I have actually checked this more than most data sets I have been able to work with.

We initially scanned it and then I had two people check each of the entries, each number that we were going to work with, two different people, and as well we did some plots and tables so that if anything was a wild value, like a really huge salary, then we would detect that and go

back and look it up and make the correction. So we had very good quality control on our work with the hard copy.

Q Are there particular terms that you utilize in your statistical field to describe the analyses that you are providing?

A Well, we looked at correlation, we looked at regression, we did T-test. I mean, there are quite a variety of different techniques that we used. Statistics is full of things that we can do with data.

Q When you use the term mean, what does the word mean?

A That is what people commonly know as an average range. Average height, average weight.

Q And when you use the term P value, what does that refer to?

A That refers to the level of statistical significance. So if you have a P value, for example, of .03, .03, that means

* * *

[179] very, very – it is very highly statistically significant, meaning just – there is just a remote – it is almost impossible that this could occur by chance, when I have had that in data sets where things are very highly significant and I try to challenge that or explain it away, because you do this, you try to say well, is it really gender, is it really something else that is causing it and not gender, and in all of my years, I can't think of one – there may be one or two times out of many, many analyses when something was so significant and we were able to explain it away by other

items that we had, other things called variables, other explanation factors.

It is just very rare for it to be so significant and also to have such a gap between the men and the women. I mean, you are talking an average of $12,000 a year salary difference. You are talking departments that have 20 people in them that are totally men, or they have 10 or 15 or 20 people and they are totally women.

So the contrast is very, very striking, and in the past when I have had such striking associations, I have not found that other things could explain it away.

Another thing is this as well. In this data base that we have here, we have – we don't have qualifications or numerical quantity for qualifications of people, and I think that the big thing that people would be looking for, say, qualifications of people in preferences.

[180] In the data base, in the data there, and I can show something on that if we wish, I noticed that the annual salary rate increase for men and women was quite similar.

In fact, women had a touch higher annual salary rate increase. I think they had about an average of 9 or 10 percent per year and men had about 8 percent per year.

So if their qualifications are really different, how is it that they are ending up with approximately the same rate of increase per year?

What phenomenon or what company is not going to relate rates of increase to job performance, to meritorious performance with the capacity of the person to do the work?

So the rates of increase for men and women were similar. The difference was not statistically significant. That is one where there was no statistically difference.

The P value was like, I don't know, .4, .8. You know, the chances are 40 percent or 80 percent that the minor difference that we had could be due to chance. So it is very likely that it is just the little difference that we see is a chance difference.

So here, men and women are having the same annual rates of increase, prompts me as a scientist to feel that qualifications which from common sense are related to raises must be about the same.

The second thing I noticed is that if you remember that [181] scatter plot that we showed earlier, the plot that we had service, and then we had the men's and women's salaries, there are a number of women there who have very long service to Tidyman's, and to get into management in the first place is an achievement.

I don't think an organization is going to promote slouchy people into their management ranks. So to achieve a management level of any type suggests that the people are competent.

And secondly, because even though they have been with the store for many, many years, we see people that have been in the store many years, we still see the salary differential between men and women.

So I conclude that there is evidence that the qualifications cannot differ radically between men and women, and from the plots and the averages that we see, they seem to be somewhat similar; that I think it is very likely and most probable, more probable than not, that gender is

entering into the cause of these differences in a causative way. That it is not just random.

Now, it is possible that the qualifications difference or some other things could chip away at that some, but I do not see that disappearing, and I am saying that based on many years of working with data where when you get initially these highly significant associations, then you bring other things into challenge it to try to explain it away, that they stay. They [182] may be reduced somewhat, but they stay as an association.

The other thing, if I could add one more thing. you know, the smoking literature, I think people –

MR. KALAMON: Objection, your Honor, this is not a smoking case.

THE COURT: I agree, unless you can develop some reason that that subject matter is relevant, and I have trouble –

MS. PRICE-SLADICH: I think the point is that most people would agree that smoking causes lung cancer, but statistically even so –

MR. KALAMON: Objection, your Honor.

THE COURT: No, I understand. I think Doctor Polissar has explained it very well in a manner that is relevant to the facts of this case.

MS. PRICE-SLADICH: Thank you, Your Honor. No further questions.

THE COURT: Mr. Kalamon.

THE WITNESS: Your Honor, could I have a two minute break please?

THE COURT: Sure. Professor Polissar would like a little break. Step out in the hall you mean? And if anybody in the jury wants to step in back or wait a minute or stand up and stretch in the box, whatever your choice.

You might go back to the jury – all right, let's just take

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[184] Polissar/Cross

A Right.

Q And we reviewed a certain group of your statistics and we were talking about the significance of those statistics.

MS. PRICE-SLADICH: What page?

MR. KALAMON: This is on page 45, counsel.

Q We were talking about salaries for men and women and the various tests that you ran in that regard, and I asked you at page 45, line 8, I said, "So what is the significance?"

"Well, it means that there is less than one chance in a thousand," which is your answer, you can see that on the screen here if you also care to, doctor.

"Means that there is one chance in a thousand that if you were – that if gender was not a factor associated with lower and higher income, that you would actually find groups – gender groups separated by that much.

"In other words, if the assignment of salaries to people was not related to gender and you are just sort of splitting a group in half, then the chance of finding a gap of that much between groups is less than one in a thousand. It says" –

THE COURT: Move it up.

Q I am sorry, "It says .000. That is not carrying out. It is probably considerably less than one in a thousand."

My question to you, "Well, how can you say that it was caused by gender? You can say – well, what you are analyzing is what your data sees as a distribution of salary by gender?"

[185] Your answer, "Right."

Question, "But you cannot, am I correct, say what the cause of that distribution is?"

Your answer, "That is right."

Question, "You can just say that this is how it is distributed and this is how I chart it?"

Answer, "You can say that when you cut it by gender, that you find differences that are significant, but you can't say from this alone, you couldn't say that gender per se is the cause of it."

That was your testimony, wasn't it, Doctor Polissar?

A Yes, right.

Q Okay. But today you are saying that gender is the cause?

A No, I am not saying that.

Q All right. In fact, what this is is you are analyzing a data base, isn't that true?

A Right.

Q The data base consists of 307 people that – with information from them from November 1, 1995, to October of 1998, correct?

A I think it may be 308, but same thing.

Q 307 or 308?

A Right.

Q All right.

A Right in that area.

* * *

[192] A Or in the pool of people who entered into the specific analysis, yes.

Q Right.

A Because sometimes we dealt with sub sets of people.

Q Right. So you are looking at the HR data base and what that reflects in certain categories on the male/female mix, and then you are saying well, if we compare that to what would happen under random selection, which would be close to 50/50, then that is the comparison you are making?

A That is similar to it, right.

Q Okay. Okay. And so one of the important features in your analysis of the HR data base, is it not, that the HR

data base has to make some very important implied assumptions, and that is that you have to assume that everyone in that data base is qualified, has special qualifications in education to fill every position if you are looking at various jobs, isn't that true?

A Mr. Kalamon, that is a little bit too general. It would depend on the specific test. The assumptions would depend on the specific test that we were doing.

Q Well, the – when you are comparing the HR data base composition, let's say, of all of the jobs in the departments with what it would be if it was randomly done, then you would be assuming that everyone could do all of the jobs in all departments, isn't that true?

[193] A No, not really assuming that. Not assuming that.

Q You would – you would need to assume in order, because if you didn't assume that all of the individuals in your pool had equal skill qualifications in education, then that would be a factor that would enter into the analysis and explain away why it is not exactly like it would be if it was just done by chance, isn't that true?

A Well, let me answer the question and help out on that. What we are assuming is that among people who – among people who are qualified – let's see how to put this.

Q You don't have any information on qualifications, do you?

A No.

Q So you are making the assumption that everyone is qualified?

MS. PRICE-SLADICH: Objection, Your Honor. Mr. Kalamon had a question pending and Doctor Polissar began to answer it and then was cut off.

THE COURT: If you want the answer to that question, you have to let him answer.

MR. KALAMON: All right.

A What we are assuming is this, is that there is some process whereby people get into these departments. I don't know what that process is. Qualifications, whatever may count in there.

And if everything else is equal, everything else being equal, that is an assumption, that if gender is not a factor in [194] how they get into those departments or how they get into those job titles, then you would have a mix of genders in the departments that would be similar to that in the data base.

Q And when you say everything else being equal, that means that there cannot be differences in special qualifications, isn't that true, Doctor Polissar?

A To the extent that there are differences, that then it would diminish the effect of the role of gender.

Q That is exactly right. In other words, for your analysis that you are going through here, you are assuming that everyone has the same qualifications?

A No, I am not really assuming that.

Q Don't you also have to assume, Mr. Polissar – Doctor Polissar, that when you look at – for instance, one of your assumptions is that the job titles reflect a difference of men and women, such that some job titles tend to

be mainly or in the majority occupied by men and others tend to be occupied mainly or in the majority by women.

Now, you are looking at all of the job titles in the data base, are you not?

A In that case, I was looking at job – the analysis I presented was job titles with 10 or more people in them.

Q Right, all job titles with 10 or more people?

A Right.

Q That is right. And what you are assuming then for your [195] analysis is that all of the people that you are looking at in the data base are equally qualified for all of the jobs?

MS. PRICE-SLADICH: Objection, Your Honor. Doctor Polissar has answered this question about assuming the qualification three or four times now, so it has been asked and answered.

THE COURT: Overruled.

A No, I am not assuming that. I am not assuming that. I am saying that whatever process generates people in departments or people in job titles, that if gender is not a factor in it, then you would not expect to see those kinds of differences we saw.

Q Well, Doctor Polissar, isn't it true that your analysis doesn't take into account in any way the varying qualifications of education experience that the people in this pool might have for the particular job titles, isn't that true?

A That is not completely true, no.

Q Not completely true?

A No, that is not true.

Q Well, what part of it is true?

A Okay. We don't have – what is true is that we did not have explicit variables with a label qualifications on it. We didn't have explicit columns in the data base supplied to us that are something like a performance score or anything like that. We did have, what I mentioned, was percent increases, [196] salary increases.

Q And what you also did not factor in is a person's individual preference for a particular job area; that is not part of your analysis either, is it?

A That is right.

Q Okay. And nor did you factor in an individual's particular motivation that might enter in to how they do in the company, that is not factored in?

A Right.

Q And nor the individual's particular discipline, how that might fit in and affect the calculations, that is not in there?

A Right.

Q All right. So under that assumption then, people that you were analyzing in this data base, and you are looking at various job titles, you are assuming then that they would have an equal desire for the jobs and be equally available for the jobs; that is something that you can't factor out of your analysis, isn't that true?

A Well, I am not assuming that, no. I don't have information on that so the model that I am using is a very simple one. There is some process going on that I don't have detailed information on it.

I just have the gender and these titles. So under – whatever that process is, if it is blind to gender, then you wouldn't see the kind of separation that I showed.

[197] Q That is right, and so if it is just gender, but you cannot – you cannot say on the basis of scientific principles what is explaining the difference and the distribution that you see, analyzing the data versus what you would expect in a random distribution, isn't that true; you can't say what the cause is?

A For like a specific analysis, for example, when I was presenting the department picture, in that case, I cannot rule out qualifications in that instance as a possibility of explaining some or even all of the difference for that one, and at the end of my thing, I gave a comment on the gestalt, the feeling of the whole analysis.

Q And you also cannot rule out preferences – individual preferences that people might have to work in a certain area, floral, meat, deli; you can't rule that out, can you?

A Right.

Q In fact, to put this in a little bit [sic] perspective, at least for me, because I am not very bright about all of these statistics, but as I understand a random distribution, let's say if I had a hundred marbles in my hand and they are green and gold, Shadle Park colors of course, you wouldn't know about that, but if there are a hundred marbles and I throw it over in that corner against that

wall and then I want to measure and see how many marbles are two feet from that wall, if the marbles are the same size, same weight, same circumference, you [198] would expect that the number – or the composition of the marbles from that wall would be in the same composition, 50/50, as the ones in my hand, that is a random distribution?

A Yeah, but with some random variation, but the mix would be similar to those close to the wall versus those far from the wall.

Q That is right, that is right, and it would be similar to the mix that I started with when I threw it?

A That is right.

Q Okay. If we change that though, if we change that and say that now we have a mix of green and gold, but some are marbles, some are made out of steel, some are made out of wood, some are made out of paper, some are made out of plastic, and then we throw that from here again over against that wall, you wouldn't expect to see a 50/50 mix anymore, would you, because there are special features about those marbles that are going to interact and disrupt the random distribution that you expect, isn't that true?

A Right.

Q All right. We are not marbles, are we, Doctor Polissar; the people in this data base are all different, wouldn't you say?

A Everybody is an individual for sure.

Q That is right. It is America, it is a wonderful country, and the people in this data base compose different degrees of [199] education, isn't that true?

A I don't know, I don't have information on that.

Q From a stastical standpoint, would you expect that 307 people or 8 would all have the same education?

A No, I am sure there is some fix.

Q Okay. And some different mix in experience?

A Right, we did have an experience variable.

Q Right. And some different mix in preference for job?

A Very likely.

Q Some different mix in motivation?

A Right.

Q Some different mix in discipline?

A Uh-huh. (Affirmative).

Q So all of those things could factor in to be a cause that makes the expected 50/50 composition different –

A Uh-huh. (Affirmative).

Q – when you look at this data base, isn't that true?

A For that to be true, those would have to sort themselves out differently for men and women. The men and women would have to have a different profile in those factors.

Q And you don't have any idea whether the men and women, in fact, do have different profiles, do you; you have no idea on that?

A No.

Q All right. Let's take the example of a department.

[200] THE COURT: Are you going to have a significant amount – we are not going to be able to finish with professor Polissar this afternoon, because you have redirect, I assume, Ms. Sladich?

MS. PRICE-SLADICH: At the moment, I just have two questions, Your Honor; five minutes.

THE COURT: Well, how much time do you –

MR. KALAMON: And I think I have just another five minutes.

THE COURT: Well, maybe we can save you coming back over.

MR. KALAMON: Save the doctor a trip.

THE COURT: If the jury can be patient with us a few more minutes maybe, and save him a trip back over from Seattle.

Q This is the job code, gender cross tabulation and I am looking down here under the floral department and we see there that – sorry to keep moving this back and forth.

We have columns female/male and under floral – under floral manager, it is 100 percent female, and – I am sorry, floral department, and then floral manager, it is 100 percent female.

And you have no way of knowing, Doctor Polissar, whether that is because of the preference that is being displayed by females to go to the floral department?

A Right. Incidentally, I didn't use that because of those [201] small numbers in there, but if you are asking me about the qualifications of people and their preferences, no, I don't know about that.

Q Incidentally, in your regression-type analysis, that is where you attempt to isolate a specific variable through sifting out other variables, is that true?

A Well, similar to that. It is a way of seeing if one variable, one item, is important even if you control for another one.

Q That is right, and you weren't able to do that – or you didn't do that in your analysis here, did you?

A Yes, I did.

Q Well, you removed experience as one, but the other variables are still there?

A Things such as qualifications and so on?

Q Yes.

A Right, I don't have information on that.

Q So qualifications, experience, preference, motivation, that sort of thing is not there?

A Experience is there to the extent of years of service with the company.

Q All right. Now, in your analysis of the pay, the compensation level, this again is one of your charts, and it shows the group statistics both first and last?

A Can you tell me which exhibit that is please?

* * *

[205] distribution, isn't that true, Doctor Polissar?

A It could.

Q And likewise –

A But again, you know, is that the factor alone, the unique factor? That is, why weren't they applying? When we consider why weren't they applying, is there some other thing that is keeping them from applying? That again may not be the only factor.

Q It may be many factors, you just don't know; you just don't know. You can only determine by looking at this chart, you can just take a snapshot and see what the composition is; you can't say anything as to why the cause, isn't that true?

A Right, for this one unique look we are taking.

Q And likewise, Doctor Polissar, you have made assumptions here and you have acknowledged in your deposition that you are taking a snapshot of this data base and you cannot say what the cause of the distribution is?

A I can't present a numerical quantity that represents the probability of cause. I can't present a number, but I can assimilate what I have seen and bring my experience to bear on it to make a comment as to what I think is likely – more likely than not.

Q But you have – we have already identified that there could be experience, there could be qualifications, there could be preference, there could be motivation, these are all other

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[208] Polissar/Redirect

Connie at 65,000 a year, I assume you included Mike – Lee Clark at $108,000 a year?

A Right.

Q Okay.

A They were all in there.

Q And finally, Mr. Kalamon made reference to your deposition where you answered, "From this alone you couldn't say that gender per se is the cause of the distribution of men and women at Tidyman's."

Is that inconsistent with the answer you gave today that on a more probable than not basis, gender is probably a significant factor in the distribution that you see?

A No, that is not inconsistent.

Q Why not?

A It is not inconsistent because the one when Mr. Kalamon was quoting from the deposition, which I fully claim that is what I said, I don't have a numerical quantity to attach to the cause.

I can't say this is 90 percent sure that it is the cause, I don't have that, but in the taking all of the evidence together and referring again to the much – many, many

analyses that I have done over the years where I have challenged variables, challenged items to live up to their initial performance, that I have never, or perhaps maybe once or twice in so many thousands of analyses, seen one explained away by other factors

when it is initially this strong.

MS. PRICE-SLADICH: Thank you, doctor, no further questions.

THE COURT: Mr. Kalamon.

RECROSS-EXAMINATION

BY MR. KALAMON:

Q Doctor Polissar, although you conducted many tests as we have talked about just a moment ago, the ones that you went over here today were only those tests that supported the plaintiffs in their claim here today, isn't that true?

A That is not correct.

Q Isn't it true that in your profession, Doctor Polissar, is that it is absolutely without question a tenet of statistical analysis that you cannot do anything other than portray what the statistics demonstrate; you cannot speak to the cause?

A You cannot numerically talk about the cause, yes, that is a tenet of it, but you can speak about probable cause.

MR. KALAMON: I have no more questions.

THE COURT: Thank you, Doctor Polissar. And members of the jury, thank you very much for your patience.

We are 12 minutes over, and we have a 2:00 o'clock, and we will just take a brief recess so people can change. We will pick up the 2:00 o'clock in about three minutes. The jury is

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[124] Davis/Direct

known or readily obtainable by the defendant is insufficient to admit or deny other parts of the matter.

I think that was the last one, am I correct? And with that, Your Honor, the plaintiffs rest.

THE COURT: All right. Thank you, Mr. Eymann. All right. That means that the plaintiffs have completed presentation of evidence in their case in chief.

We now turn to the defendant. Mr. Kalamon, ready to proceed, sir?

MR. KALAMON: Yes, Your Honor, the defendant is.

THE COURT: You may proceed.

MR. KALAMON: The defendant would call Mr. Mike Davis to the stand please.

THE COURT: Mr. Davis, step up here if you would please to be sworn.

(WITNESS, MICHAEL DAVIS, called as a witness on behalf of the defendant, having been first duly sworn by the Court, was examined and testified as follows:)

DIRECT EXAMINATION

BY MR. KALAMON:

Q Mr. Davis, would you state your name for the record please?

A Michael Allen Davis.

Q And what is your home address?

A 7720 East Columbia Court, Spokane, Washington, 99212.

Q And who is your employer?

* * *

[203] her – she receive her pay for that period of time?

A Yes.

Q Okay. Did Miss Lamphiear receive paid vacation?

A Yes.

Q Okay. How did you go about – well, let me ask a foundation question. Who in the Tidyman's organization was responsible for establishing Miss Hemmings' yearly salary from, let's say, 1986 to 1996?

A I would have.

Q And how did you do that?

A There were really two different approaches at different points in time. Would you like me to describe both of those?

Q Yes, please.

A In the first years, probably through the late 1980's, I had no information available to me from a regular source so my source of information would have been people practicing in the profession here in the Spokane area.

I still had all of my contacts working at Coopers and Lybrand's acquaintances. I had a pretty good idea of what the market salary was for a controller in a company of our size.

After that point in time, probably right around 1990, '91, somewhere in that time frame, the Food Marketing Institute began to publish an annual salary survey, and we would participate as one of their members.

What that involved is we would send our payroll information [204] to FMI and then they – as other grocers would, and then they would publish a pretty extensive report by position, by region, by size of the company as measured in sales, and so once we began providing that information, I got that report, and that would be my basis for salary adjustments for – or determining compensation for all of my direct reports.

Q And then with respect to Miss Hemmings in particular, how would you – how would you handle a typical discussion where you would meet with her and go over her compensation and discuss what, if any, adjustments were going to be made?

A I would do the evaluation and the salary review in the same time frame. So after we completed the review, I would then take a copy of the salary survey, the page that said controller, and it was very helpful, because it was visual.

They would have a chart. On one axis – a graph if you will, on one axis was sales – I am sorry, on this axis – on – I am trying to think. That is vertical axis.

Q Well, let me help you there. I am putting on the ELMO, I think that is what it is called, Exhibit 551 which is the FMI Institute Management Compensation Study for Controller. It is page 67 of Exhibit 551 for the '95, '96 study.

Is this the reference source to which you are referring?

A Yes, it is.

Q Okay. And then you were about to describe the nature of this?

[205] A On the vertical axis is pay compensation. On the horizontal axis is size of the company measured based on sales, and then if you look at the lines that are drawn through that, that would be the line that represents what income level you would have or what your salary would be based on your company's size in sales. The dark lines is base salary only. The –

Q What does that mean?

A That is salary before bonus.

Q All right.

A Okay. And the dotted line would be if the company had a bonus plan, what was the combination of bonus plus base salary.

Q All right. And this is a study from 1995 to 1996, and another exhibit that we have, Exhibit 1152, reflects that for Connie Hemmings, which is at the bottom of this page – you see at the very bottom there, Connie Hemmings.

Turning over to July 1st, 1995, which I will, July 1st, 1995, shows that at that point in time she was making $62,830?

A That is correct.

Q All right. Then looking at the FMI source document, could you guide us through how that would be looked at?

A Yeah, I think again if you go across the horizontal axis, at that point in time the company was probably 195 million in sales, maybe 200 million in sales.

Q So that would put you on this vertical line?

A That is correct.

[206] Q All right.

A And so I would take that and look for the intersection of the line indicating salary ranges.

Q Yes, right at my pen noted?

A That is correct.

Q And then you would go left to there and that reflects?

A Sixty thousand.

Q Right, and at that point, Miss Hemmings was making 62,830?

A Yes.

Q Okay.

A And so during the salary review, I would have a copy of this for each of my direct reports, I would indicate to them the basis for the compensation adjustment based on the industry and the size of our company.

Q What would you do with a copy of this particular document; would you keep it in the file or give it to Miss Hemmings, how would you handle it?

A I retained the original copy of these reports. When Tim Metcalf joined the company, I transferred all of these documents to Tim because I thought they would be helpful for him in his human resource role.

Q And when did Mr. Metcalf come on board?

A It was in 1995, but I can't remember which month.

Q All right. Was there anyone else that was responsible for setting Miss Lamphiear's – I am sorry, Miss Hemmings' salary

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[154] Odegard/Direct

employed at Tidyman's, do you feel that Tidyman's has provided opportunity for you?

A I think there has been opportunity presented. Certainly was up to me to take advantage of it.

Q Was there opportunity, in your opinion, presented to Miss Hemmings?

A Oh, yes.

Q To Miss Lamphiear?

A Yes.

MR. KALAMON: Thank you. I have no further questions.

THE COURT: Any redirect, Miss Price-Sladich?

MS. PRICE-SLADICH: No further questions, Your Honor.

THE COURT: All right. Thank you, Mr. Davis, you are excused, sir. Next witness, Mr. Kalamon.

MR. KALMON: Yes, thank you, Your Honor. Pardon me for the delay, Your Honor. Defense calls to the stand Mr. Rich Odegard.

(WITNESS, RICHARD E. ODEGARD, called as a witness on behalf of the defendant, having been first duly sworn by the Court, was examined and testified as follows:)

DIRECT EXAMINATION

BY MR. KALAMON:

Q Would you state your name for the record please?

A Yes, my name is Richard E. Odegard, and I go by the nickname of Rick.

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[167] information for, it was very promptly done.

Q Did you have any prior exposure to Mr. Clark before you actually interviewed him?

A The only prior exposure that I had was a presentation that he had made to the board of directors and other than that, it was very, very limited.

Q How would you assess the presentation that he made?

A He did a very good job with the presentation.

Q All right. Any prior experience with Miss Trudy McCoy?

A No.

Q Okay.

A Or if so, it was quite limited.

Q What characteristics in your own mind were you looking for in the person that was going to fill the CFO job?

A Well, basically it is a job that is really critical to the long-range process of how a company works in its performance. It is very important that you have someone who understands accounting, who understands all of the ramifications of accounting, but in addition to that, you need to have a professional manager who can do the

planning, leading, controlling and organizing, who can lead people.

You need to have an individual who can make excellent presentations to the board, who will be able to interface with the board and to be able to communicate the information to the board.

[168] And with most boards, most of them are not accountants, most of them are not bankers and there are times when it really is critical that this accounting information be articulated properly.

In addition, you have the interrelationships with the accounting firm which are very, very important for the long range viability of the company, that those go well, and you also have the situation with bankers, and having been a banker and been on the other side, I have a pretty good knowledge of what that situation is all about.

And the last thing in my management style is I tend to be a person that likes to bring together the players who are involved with whatever the problem might be, and sometimes in the case like if it is a problem dealing with tellers, I would like to have tellers available to be able to talk.

And in this situation with the management team we were putting together, I needed people who were willing to enter into debate, and I even go to the point where it is serious heated arguments, because I have a very strong belief that as you begin the management process and the debate process and you are trying to look forward to the future for the company, you need people who have an idea here and one over here, and you try to work to find the center ground, because the center ground usually is the

right course of action to take in wherever you are going to take a company. So those were the [169] things that I was specifically looking for.

Q And the CFO position as you envisioned it, would that be a position where you would see that there would be black or white solutions or solutions that involved ambiguity; how did you view that position?

A Well, in some of the accounting stuff, it is black and white, numbers are numbers, but in the management process of looking for where the company is going, it is most often gray.

And if you have people who are taking positions and holding to them and in the debate, will not move from those positions, you do not find the common ground of where the company needs to move itself, and it is very difficult to have strong debate when you have someone who is very black and white.

Q Would the CFO position as you envisioned it involve an ability to plan, develop policy, or follow policy?

A I think the person needs to be in the process of helping to plan it and they also need to implement it. There is both sides of it, and it is – there is a fine line of when you are doing which side of that, but the fact is that you need someone to be able to do both.

Q How important in your mind was the CFO job at Tidyman's that you were about to fill?

A I think it was critical. I think the CFO position in any corporation of the size of Tidyman's, and we are talking annual sales in the 200 million dollar range, is a very, very critical

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A I attribute it to John Maxwell.

MR. KIRBY: Thank you, I have no more questions, Your Honor.

MS. PRICE-SLADICH: No more questions.

THE COURT: Thank you, Mr. Nypen, you are excused, sir. Next witness.

MR. KIRBY: The defense calls Mr. Streeter to the stand, your Honor.

(WITNESS, JERRY STREETER, called as a witness on behalf of the defendant, having been first duly sworn by the Court, was examined and testified as follows:)

DIRECT EXAMINATION

BY MR. KALAMON:

Q Would you state your full name for the record please?

A Jerry Streeter.

Q And where do you live, Mr. Streeter? In the Spokane area?

A I live in Coeur d'Alene, Idaho.

Q And give the jury a little description about yourself, Mr. Streeter, where were you raised, where did you go to high school?

A I was born and raised in Coeur d'Alene, Idaho, 43 years ago where I still reside today. I graduated from high school in 1974, Coeur d'Alene High School.

Q And after graduating from high school, what type of work did you do?

* * *

[59] like Jim Tidyman and Ken Ormsby, to explain it to you.

Kind of go through and point out your weaknesses and strengths, how to watch your own personality. Very useful tool. I very much appreciated mine.

Q All right. Let's change direction and focus a moment on grocery supervisor. That position was filled and there is testimony in the record that the grocery supervisor position was filled by George Hauserman in July of '92 and then later by Greg Babbit in July of '94.

What did you have with respect to the – what involvement did you have with respect to the filling of those two positions?

A In 1992, when I was asked to move to director of operations by Jack Heuston, I replaced Ron Bashaw. Ron Bashaw was asked to go to Sprague and McDonald.

At Sprague and McDonald there was a gentleman by the name of George Hauserman who had been a store director four years.

I had asked him – Jack had originally talked to me and told me that he wants George to move out. Ron Bashaw, therefore, took his place, and George Hauserman I used to come into the office to fill the position, newly created position by the way, of the grocery supervisor.

Q Then describe if you would for the jury what were the areas, the duties and responsibilities of that position, the grocery supervisor position?

[60] A It was a very – I think I could do that best by backing up a minute. Ron Bashaw that I preceded in the role of director of operations, handled a lot of the initial contacts with broker salesmen and our wholesaler where we get most of our groceries, SuperValu personally.

I realized that if I was going to make some changes in the company, I would not have the time to sit and deal with salesmen so I wanted somebody that could call on the stores.

What I pictured that person [sic] is retail experience first and of most importance, because that person would have a feeling of seasonal changes in the store which are critical to the right product to buy.

Pricing in the stores, which that person would be responsible for. Every item in the store has to have a retail price, and your retail prices are as critical as your building itself to have them right or you just don't do business today. It is a key role in accountability for that person.

The placement of the product, when it got to the store was all responsibilities of that person. So it was really product, the people and then the pricing.

Q Patty Lamphiear had suggested in her testimony that she felt that she should have been selected for the grocery supervisor position in '92 and then later in '94. Did she have any retail grocery experience in the stores?

A To my knowledge, Patty Lamphiear had no retail experience [61] at store level.

Q Okay. Without that retail experience, would she have been, in your mind, in any way close to being qualified for the grocery supervisor job?

MS. PRICE-SLADIICH: Objection, leading.

THE COURT: Overruled.

A Without retail experience, and I am talking more than a year or two, I would never have talked or moved somebody to that position, no.

Q What level of retail grocery experience did Mr. Hauserman and Mr. Babbit have when they stepped into the grocery supervisor position?

A First, Mr. Hauserman had been with our company since 1972 with a small break in service for an operation. Greg Babbit was probably two or three years behind that. So he would have up to 15 to 20 years experience. George was a little longer.

Q Did Mr. Hauserman before becoming grocery supervisor ever serve as a store manager or store director as you call it?

A Yes, George Hauserman actually worked with me in 1972, he was a night foreman and he became assistant manager and then store director in a small store, store director in a larger store, and then ultimately his last role was store director in the largest store in our company.

Q Did Mr. Babbit have any experience as a store manager or store director?

[62] A Yes, Greg Babbit, when I met him, was a night foreman. I interviewed and put him on as assistant manager on at least one, I think it was Lyons and Coeur

d'Alene – in fact, I know it was as a new store assistant manager and then when I moved him to office, he was store director for the Cedar store on the north side of Spokane.

Q Okay. In getting back to the duties then of the grocery supervisor, what if any duties would require the grocery supervisor to actually go to the stores to make sure certain things that they wanted to have happen were happening?

A That person could only go see if everything they worked on or conglomerated or put together at the office was working when you go to retail and see if it looks, is priced and is set up the way you anticipated with the store contact which would usually be the assistant manager, or if you had to or could, the store director.

That was the finishing point to go make sure that what you thought was happening was happening and you had to go to every store to do that.

Q When you say to make sure it looks and is set up the way you want, what are you talking about, Mr. Streeter, you have been in the business 26 years and we haven't?

A As a retailer – as an experienced retailer, you wouldn't want to have mops and brooms as the first thing a customer runs into when they walk in your grocery store.

[63] Through experience, and it takes several years of experience, you would want to put the store together so as a customer entered the door, they would see something fresh in a food court store. That would be the first item they will want to see, apples, lettuce, whatever it is.

That would be the first thing. When you get into grocery, you would want to see seasonality items. This time of year, we just went through Easter, you would want to see fruit cocktail, you would want to see pineapple, you would want to see cocoanut, you would want to see all of the things customers use in every department for the particular season.

You would not, therefore, want to walk into a grocery department and see leftover briquettes from the summer season, even though right now would be a good time.

You wouldn't want to see marshmallow cream left over from Christmas. You wouldn't want to see candy canes hanging around.

And the more and the better experienced you are at that, the more you can have the products there when the customer wants them, and it was that person's role for their experience to make sure that when you walk through, there is no surprises.

Rather, and then no surprises, you would have a nice shop and environment through the whole store for the customer. Takes years of experience.

[64] Q Would the grocery supervisor have any responsibility for the pricing of the products in the store?

A Other than HBC at that time and the perishable departments, which is produce, bakery, meat and all things that would go bad if you shut the refrigeration off, that person is responsible for the retail price on every single item in every store.

Q Approximately of the – let's say there has been testimony that in 1996, of the gross volume of sales for

Tidyman's was around 200 million, of that 200 million, how much of that would be attributed to non perishables?

A More than half.

Q So 100 million?

A At least a hundred million dollars.

Q Would that be the responsibility of the grocery supervisor position that we have just been talking about?

A Ultimately, that is correct.

Q To whom would the grocery supervisor talk with when he went to the store and was looking at the stores to see if they are set up and looks the way he wants that to be?

A In most cases, the grocery supervisor would spend his or her time with the assistant store managers, and in most cases, they would spend half of their time with the store director also because of the background of – most, and in fact, I think every store manager and grocery department in our company.

Q Okay. What, if any, capability would the grocery [65] supervisor have to have with respect to handling and supervising multiple employees?

A With all of the assistant store directors handling in grocery, most of the managers involved most of their time with grocery, there was several people in pricing.

The supervisor would have to hold meetings. That person would have to be skilled at handling probably up to two dozen people at a time in meetings and several people in the store at a time at different hours.

THE COURT: Do you have much more direct, Mr. Kalamon?

MR. KALAMON: Yes, I do, Your Honor.

THE COURT: All right. We will take our morning recess now, ladies and gentlemen. I apologize for the fact that the clock is still on wintertime not springtime. We will try to get them to change that.

(WHEREUPON, court recessed at 10:15 a.m.)

(WHEREUPON, court reconvened at 10:30 a.m., in the courtroom and in the presence of the jury for the following record:)

THE COURT: You may continue with your direct, Mr. Kalamon.

DIRECT EXAMINATION – CONTINUED

BY MR. KALAMON:

Q Mr. Streeter, you mentioned that as vice-president of

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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

CONNIE HEMMINGS; and PATTY LAMPHIEAR, Plaintiffs, vs. TIDYMAN'S INC., a Washington Corporation, Defendant.	April 7, 1999 Spokane, Washington CS-97-0068-WFN (Filed Apr. 20, 1999)

EXCERPTS OF PROCEEDINGS
CLOSING ARGUMENTS ON
BEHALF OF PLAINTIFFS

BEFORE THE HONORABLE
WM. FREMMING NIELSEN, JUDGE, AND JURY.

* * *

[2] APRIL 7, 1999

MORNING SESSION

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THE COURT: Counsel ready for presentation of their arguments.

MR. EYMANN: Yes, Your Honor.

MR. KALAMON: Yes, Your Honor.

THE COURT: You may proceed, sir.

I might point out this morning we have apparently Mr. Baker, whom you have been looking at for two and a half weeks, called in ill this morning, so Miss Bohn is

filling in. She got down here early and is standing in for Mr. Baker. Mr. Eymann, you may proceed, sir.

MR. EYMANN: Thank you. Ladies and gentlemen of the jury, Miss Hemmings, Miss Lamphiear, Mr. Kalamon, Mr. Kirby, co-counsel, Your Honor, everyone else in the courtroom, I first want to talk about liability in this case. That's in issue, and I also want to describe for you in what is called summation or argument, called different things in different courts, how that all fits into this particular case.

You've heard that the testimony or the comments of counsel are not evidence. We're here to essentially

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[32] male-dominated corporate structure and a power structure that exists, and it's real and it's been maintained for many years, over a decade, because you have a board of directors that's elected to ESOP trustee. The ESOP trustee is elected by the committee. The committee is appointed by the chairman of the board. Now, isn't that the most incestuous type of keeping the boy club together than you probably could have? Don't forget they have Christine Ayre (ph). She is on the board of directors and sits in on the meetings. Did she come into trial and testify? No. That is because she is just a token woman that they have put up on that level, and, excuse me, this is probably offensive to the defense counsel, but it's the same as – same as having a paralegal, who is a woman sitting at the defense counsel so there is not just a man sitting over there. Rose Marie is good at her job, but I would submit there is more to her job than just sitting there as a paralegal.

They had Karen Riba testify that she was paid less than wage scale. On May 3, 1996, Babbitt requested pay scale for Patty's senior procure, which demonstrated Patty's wage scale was 38,000 to 45,000, Babbitt does nothing and then increased it to 28,000 to 35,000. Riba also testified that she accepted a job description match

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[48] that they trained themselves to do, that they worked so hard to do, that they made excuses to their loved ones or they told them the truth, you know, didn't come home yet, I know it's 9:00 o'clock at night, but I'll be there in the morning, going back to college and getting 3.93 GPA so that you are prepared to step in because you are the most knowledgeable, the most experienced person in this entire company when it comes to the finances. But isn't it really ironic that it's today? Today is the 25th anniversary – the 25th anniversary of Connie Hemmings' first day at Tidyman's. Twenty-five years of sweat and blood to get where?

Both of these women have the right to be paid more. They have the right to be promoted earlier than they were, a raise in pay earlier than they were, to have a happy work life, to not be discriminated against overtly, or not so overtly in some cases not to be told that you are an emotional woman, or turned into one by what Mr. Babbitt did to Patty Lamphiear. I mean, I told you at the beginning of this case that what they did to Patty Lamphiear is just about the most egregious thing anybody could do to a person. They might as well have taken her out in the alley and raped her. They raped her mind, and Mr. Babbitt gets up there and says I was – I don't know what happened, and whether the stories [49] mesh or they don't mesh, he knew what he was doing. This woman had made a

complaint against me, Greg Babbitt, and she was not going to get away with it; I've just got to figure out a way to get her out of here, and he did, and the defense will say, well, she wasn't doing this correctly and maybe she should have been delegating her authority and maybe she should have been delegating her time and all the other jack rabbit-type defense they have in this case. But I think you know from the testimony of Patty Lamphiear, the way she talked to you, you can't sit on the stand and make that stuff up. You can't sit there for hours and hours and have said the same things and then come into court and repeat it. You want to know what happened to these two women? You take a look at Dr. Chalam's testimony and the notes of Rachael Johnson, if you have any question about how these two women were devastated.

I feel really inadequate to stand up here and try to tell you that you can't go back and fix this wagon. You can't go back and do a frontal lobotomy on Tidyman's. The only thing that you can do in this case is to render compensation, and you're going to have to give a lot of serious thought to that, because what they did to these two women almost is undefinable. You may have lost a job in the past, you may have been

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[56] APRIL 7, 1999

MORNING SESSION

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MS. SLADICH: The good news is I'm the last attorney you'll have to listen to in this case, and so I'm obviously not going to be able to respond to all of Mr.

Kalamon's points and let's hit the high points, let's stick with the facts.

First thing, Mr. Kalamon says to you is comparing the stories of the parties is not relevant, it's a red herring. Let me tell you why we did it, understand the disparate impact theory, we have to prove there was a policy and that in implementation of that policy, which was somewhat – it had a disparate impact on women, not the plaintiffs, but on women. So what is the policy? Tidyman's policy is a totally subjective criteria for selecting individuals, men, grooming them for management positions, not posting for interviews and then promoting those men into management positions. Let's take some examples.

Mr. Davis had absolutely no experience in grocery, in retail, in the stores, in store operations, none. He admitted to it. It was a totally new career change for him. Yet, Mr. Davis goes from the CFO

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[60] you don't get ahead. That policy is what we object to. There is no business necessity for it.

Now, could Tidyman's have fixed that policy? Easily. Write up objective criteria, write up job descriptions, which they did after we filed our complaint letter, do job evaluations, which again after our job letter, they reinstituted, hadn't done it for years, provide equal opportunity for people who apply for these positions, still haven't done it. They have not corrected any of these policies and they knew that they should because this is not the first time they have been sued. I have sued them before in 1994, so they had subjective policies which had a disparate impact on all women, including plaintiffs, and that proves our

case because they did not have a business necessity for doing it, and there were ways to fix it.

How did it affect my plaintiffs? That goes to the damage issue. Connie didn't get the CFO job, Patty didn't get the supervisor job. So that's why the stores come in all the way from the person who sweeps the floors at night to the CEO of the company. It's also relevant with regard to the disparate treatment. That's the claim where we have to claim intent. Intent in discrimination cases is tricky because not only do we have to prove that what Tidyman's said their intention

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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

CONNIE HEMMINGS; and PATTY LAMPHIEAR, Plaintiffs, -vs- TIDYMAN'S, INC., a Washington corporation, Defendant.	NO. CS-97-0068-WFN ORDER (Filed Mar. 19, 1999)

A telephonic motions hearing was held in this mater on March 12, 1999. Shawn Price-Sladich and Richard Eymann participated on behalf of Plaintiffs; James Kalamon, Patrick Kirby and Michael Love participated on behalf of the Defendant. The Court has reviewed the file, heard arguments of counsel and is fully informed. This Order is entered to memorialize and supplement the oral rulings of the Court. Accordingly,

IT IS ORDERED that:

1. Defendant's Motion in Limine Re: Statistical Evidence of Hiring and Promotions based upon Gender, **Ct. Rec. 47**, amended by Defendant's Amended Motion in Limine to Exclude Expert Witness Report and Testimony of Nayak C. Polissar, **Ct.Rec. 122,** is **DENIED.**

2. The Court **RESERVES RULING** on Defendant's Motion in Limine to Exclude Anecdotal Evidence, **Ct. Rec. 51.** The parties shall submit material regarding contested witness testimony, if necessary, as agreed during the hearing.

3. Plaintiffs' Motions in Limine, **Ct. Rec. 99**, are **DENIED, GRANTED OR RESERVED** as follows:

(a) Plaintiffs' Motion in Limine Re: Exclusion of Any Reference to Plaintiffs' Insurance Status, **Ct. Rec. 99-1**, is **GRANTED**;

(b) Plaintiffs' Motion in Limine Re: Exclusion of Any Reference that the Defendant will Personally Pay any Judgment, **Ct. Rec. 99-2**, is **GRANTED**;

(c) Plaintiffs' Motion in Limine for Instruction for Parties not to Demand or Request Matters found in Opposing Counsel's File in Jury's Presence without first approaching the Bench, **Ct. Rec. 99-3**, is **DENIED AS MOOT**;

(d) Plaintiffs' Motion in Limine to Prohibit Defendant from Calling Witnesses not Equally Available to Plaintiff, **Ct Rec. 99-4**, is **DENIED**. The parties are limited to the witnesses on their respective witness lists.

(e) Plaintiffs' Motion in Limine Re: Exclusion of any Reference to Settlement Negotiations, **Ct. Rec. 99-5**, is **GRANTED**;

(f) The Court **RESERVES RULING** on Plaintiffs' Motion in Limine Re: Exclusion of Any Reference to Events Occurring in Plaintiff Hemmings' Life Prior to her employment with Defendant, **Ct. Rec. 99-6, subject to an offer of proof from the Defendant**;

(g) The Court **RESERVES RULING** on Plaintiffs' Motion in Limine Re: Exclusion of Any Reference that Plaintiff May or Could Have Received Benefits from Collateral Sources, **Ct. Rec. 99-7**;

(h) The Court **RESERVES RULING** on Plaintiffs' Motion in Limine Re: Exclusion of Evidence or Argument that Money will not Compensate Plaintiffs' Loss, **Ct. Rec. 99-8**;

(i) Plaintiffs' Motion in Limine Re: Exclusion of Any Evidence Presented by Defendant Aside from Deposition of Rick Odegard that Plaintiff Hemmings was not selected as CFO, **Ct. Rec. 99-10**, is **DENIED**;

(j) Plaintiffs' Motion in Limine Re: Exclusion of Any Evidence or Argument that Plaintiff Lamphiear's Job Performance was not Adequate, **Ct. Rec. 99-11**, is **DENIED**;

(k) Plaintiffs' Motion in Limine Re: Exclusion of Any Evidence or Argument that Plaintiff Hemmings' Job Performance was not Adequate, **Ct. Rec. 99-12**, is **DENIED**;

(l) Plaintiffs' Motion in Limine Re: Exclusion of any Evidence or Argument inconsistent with Defendant's Responses to Requests for Admissions, **Ct. Rec. 99-13**, is **DENIED**;

(m) Plaintiffs' Motion in Limine Re: Exclusion of Any Evidence Not Timely Presented to Plaintiffs, **Ct. Rec. 99-14**, is **DENIED**. the parties are instructed to comply with Fed. R. Evid. 1006.

(n) The Court **REVERVES RULING** on Plaintiffs' Motion in Limine Re: Exclusion of Evidence or Argument of the Causation of Plaintiff Lamphiear's Hospitalization through Lay Witnesses, **Ct. Rec. 99-15**;

(o) Plaintiffs' Motion in Limine Re: Exclusion of Any Evidence that is "Gender Stereotypical," **Ct. Rec. 99-16** is **DENIED**;

(p) Plaintiffs' Motion in Limine RE: Exclusion of Any Evidence or Argument that Plaintiff Hemmings' Damages are the Result of Over-Sensitivity, Personality or Predisposition, **Ct. Rec. 99-17**, is **DENIED**; and

(q) Plaintiffs' Motion in Limine Re: Exclusion of Any Reference to Motions in Limine Process, **Ct. Rec. 99-18**, is **GRANTED**.

4. Plaintiffs' Motion to Extend Time to File Proposed Jury Instructions and Voir Dire Questions, **Ct. Rec. 100**, is **GRANTED**.

5. Defendant's Motion to File Trial Brief that Exceeds Ten Pages, **Ct. Rec. 105**, is **GRANTED**.

6. Plaintiffs' Motion to File Over-Length Trial Brief, **Ct. Rec. 109**, is **GRANTED**.

7. Defendant's Motion in Limine to Exclude Statistical Evidence and to Strike Plaintiffs' Expert Testimony, **Ct. Rec. 113**, is **WITHDRAWN** by Defendant.

8. Plaintiffs' Motion for extension of Time to File Response, **Ct. Rec. 129**, is **GRANTED**.

9. As a housekeeping matter, Plaintiff Lamphiear's Motion and Affidavit for Order by Plaintiff Granting Discovery Sanction Pursuant to Fed. R. Civ. P. 37(b), **Ct. Rec. 21**, is **DENIED**.

10. Defendant's Motion to File Memorandum that Exceeds Ten Pages, **Ct. Rec. 54**, is **GRANTED**.

11. Defendant's Motion for Expedited Hearing of Defendant's Motions in Limine, **Ct. Rec. 56**, is **DENIED AS MOOT**.

12. Defendant's Motion for Expedited Hearing on Motion to Strike Plaintiffs' Trial Witnesses and Exhibit Lists, **Ct. Rec. 80**, is **DENIED**.

13. Defendant's Motion for Leave to File Reply Memorandum to Plaintiffs' Memorandum Opposing Defendant's Motion in Limine to Exclude Statistical Evidence that Exceeds Ten Pages, **Ct. Rec. 88**, is **GRANTED**.

14. Defendant's Motion to File Trial Brief that Exceeds 10 Pages, **Ct. Rec. 125**, is **GRANTED**.

15. The trial date of March 22, 1999 shall **REMAIN AS SET**.

(a) Jury selection shall begin at **1:30 p.m. INSTEAD of 9:00 a.m.**; and

(b) A final pretrial conference and motions hearing shall be held at **12:45 p.m.**

The District Court Executive is directed to file this Order and provide copies to counsel.

DATED this 19th day of March, 1999.

/s/ Fred VanSickle
for WM. FREMMING NIELSEN
CHIEF UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

CONNIE HEMMINGS; and PATTY LAMPHIEAR, Plaintiffs, vs. TIDYMAN'S INC., a Washington corporation, Defendant.	March 12, 1999 Tucson, Az. CS97-0068-WFN (Filed Nov. 23, 1999)

TRANSCRIPT OF PROCEEDINGS TELEPHONIC HEARING ON MOTIONS IN LIMINE BEFORE THE HONORABLE WM. FREMMING NIELSEN, JUDGE.

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[7] Your Number 5 will be granted. There will be no reference to negotiations for settlement. That's covered under Evidence Rule 408, and is very clear.

Now, your Number 6 says any reference to a rape that occurred in November of 1968. I have to reserve on that. I don't know if that's relevant. If some expert may be testifying that some event that occurred in a plaintiff's life may have affected job performance or job ability, it may end up as an appropriate basis for some opinion in some expert's testimony. So I'm going to reserve on that. I'm not going to grant that at this time.

MR. EYMANN: Would that come under an offer of proof, if that issue were to come up?

THE COURT: Yes. I'm very reluctant to allow bench conferences. I would rather follow the rule we will

not have bench conferences and we will not excuse the jury to discuss matters.

What I remind counsel is this, is I will make myself available in the morning as early in the morning as you want to get together, during the noon hour, after court to discuss any issues, evidentiary or otherwise, and I encourage counsel to anticipate when those issues may come up so we can discuss them, and one procedure that is very helpful in that regard is this: If counsel [8] will provide a list of the next day's witnesses to counsel, opposing counsel, you then have a pretty good idea with your familiarity of the case what issues may be coming up. So if you anticipate something like this that's going to be dealt with the next day, we'll get together at 7:00 in the morning and discuss it. But there was some indication here we were going to have a bench conference every time somebody testifies. That's not going to happen. You might as well conclude there will be no bench conferences. The jury will be kept busy at least six or six and a half hours every day hearing testimony, not sitting in the jury room and not sitting in the jury box while we have a bench conference; otherwise, this case will go on for a long time.

So to answer your question, Eymann, let's anticipate these issues and deal with them closer to the time that they come up.

MR. EYMANN: And I understand that. I think that both sides have issues that would fall either an offer of proof or something like that, so what I hear you saying is you better respect one another and if something like this is coming up with regard to this rape thing or something coming up on anecdotal evidence, that we need confer before the testimony is going to hit [9] the stand and both

counsel should not be asking questions right out of the blue on those types – on those areas.

THE COURT: Yes. I think counsel knows what the controversial issues are, and all counsel in this case should be acting professionally and not get into an area that you know is fraught with danger. Those are the areas that should be dealt with, as you suggest, Mr. Eymann, among counsel and hopefully resolved, and, if not, I'm there to help resolve them. But what I'm saying is I'm very reluctant to take jurors' time to deal with issues that we can deal with on our time. Does that make sense?

MS. PRICE: Yes.

THE COURT: Collateral source, I have to reserve on that. Generally speaking, I recognize the collateral source rule would exclude evidence of payment; however, I've seen situations where it may arguably be admissible on, say, for example, a motive. I'm not prejudging this. I don't know. But I can't rule on this at this time.

Your Number 8, you've asked that no argument regarding the fact that money will not compensate. I deny that. Argument on damages are entirely appropriate, and I can't rule that that that [sic] would be

* * *

[14] Your Number 16, I'm going to deny that. I think I've already talked about it in other motions. Qualifications for the job may be relevant and may be appropriate bases for expert opinions, and I'm not going to grant a motion to exclude it at this time. It would be an evidentiary issue that may again need to be dealt with at the time of the trial.

Your Number 17 seems to be sort of a catch all that nobody is supposed to make reference to the court's pretrial rulings. I think we all understand that. There are certain things the jurors don't need to know about, and that's what we've done up to now. So I guess that motion is granted.

Now, let's talk about the defendants' motions, and Mr. Kalamon, Mr. Kirby, you've asked that the court exclude plaintiffs' statistical expert on the theory that – as I understand it, on the theory that the statistics include, in effect, all employees of the company, many of which are in totally different occupational fields, and the statistics based on those individuals would not be relevant to this case, something to that effect.

My reaction for that is I'm not going to grant that at this time. It seems to me that if an expert comes forward and testifies about matters that are [15] subject to impeachment on cross-examination, that that's the best way to handle it. Cross-examination and arguments of counsel, I think, would be the best way to handle what you feel is an analysis that is not reasonable. So I'm going to deny that motion to exclude that portion of plaintiffs' experts anecdotal evidence.

MR. KALAMON: Your Honor, before we move on, beyond the statistical evidence, there was another component of our Motion in Limine.

THE COURT: Remind me.

MR. KALAMON: That was to exclude any information about the male-female mix of the store matters.

MS. PRICE: No – I'm sorry. Jim, go ahead.

MR. KALAMON: I assume we'll be able to make our remarks and then have opposing counsel respond.

THE COURT: Right. Go ahead.

MR. KALAMON: That in this situation, the plaintiffs had never worked in the stores, they hadn't worked as managers, assistant managers, or department heads or checkers or box persons, and a year ago the court reluctantly allowed discovery of the store information reserving its admissibility on that issue until later on, and after requests for admissions and depositions, we're there.

[16] The plaintiffs wish to elicit testimony about the percentage of men versus women who are store managers, assistant managers to support their claim that the plaintiffs did not get the job they wanted or the pay they wanted, and that's absolutely irrelevant to the issue here. These are not at issue jobs. Connie Hemmings was denied, according to her, the CSO, those are corporate jobs. They haven't worked in the stores, Tidyman's. They have never worked in the stores of Tidyman's.

THE COURT: Well, you know, Mr. Kalamon, if an expert gets on the stand and tries to testify based on flawed statistical analysis, you would have a hey day on cross-examination.

MR. KALAMON: It's designed to inflame the jury, judge, on an issue that has nothing to do with the issues before the court.

THE COURT: Well, what you are saying is that plaintiffs in this case are management level and other individuals are at hourly rate levels.

MR. KALAMON: These individuals are in the corporate office and what they seek to have the witnesses testify to is the composition of the managers in the stores. They have nothing to do with one another. The only purpose is to confuse and inflame the [17] jury and mislead them into thinking for some reason we have to have a male-female mix in the stores, which they have no obligation to do. Under *Wards Cove*, there is no obligation to have quotas and make sure our work force is equally distributed, and for the plaintiffs to bring that testimony forward, it would suggest that if there is a departure from a 50/50 split, that somehow we are in violation of some standard, and so I think it's highly inflammatory and has to do with an issue completely so far afield from what's before the jury in this particular case.

THE COURT: Miss Sladich?

MS. PRICE: Well, the reason I burst out with that "no" is counsel specifically withdraw that motion, and, instead, and I did not object to the timeleness of the motion, which was before the court that you already ruled on, that the statistics dealing with the different fields in the department and different fields in the company are admissible, and it's an issue of the weight to be given the evidence and not to admissibility. Let me say for the record I floored because that prior motion back in October was withdrawn by counsel.

THE COURT: What I'm going to do is I'm denying the motion. As I said earlier, it can be argued, and if you are right on the legal analysis, it will also be [18] treated in the instructions to the jury, Mr. Kalamon, if the jury is not to take into account quotas that deal with classes of employees that are totally different than the

class in which they are located. The jury can be instructed to that effect.

MS. PRICE: All right, Your Honor. I think you are causing more grief than good. The case law is pretty clear that the evidence does come in for purposes of a disparate impact case because then we're showing a pattern and practice as a defendant which affects women. So the pattern and practice of Tidyman's is a glass ceiling, and that's why Your Honor allowed discovery of it. It also comes in --

THE COURT: Miss Sladich, I've ruled your way.

MS. PRICE: Except he's going to argue in the jury instructions.

THE COURT: Well, we haven't perfected the instructions yet, have we?

MS. PRICE: Oh, I'm sorry. Thank you.

THE COURT: Anecdotal evidence. Sometimes that's admissible, but it has to be limited to situations that are similar, not necessarily absolutely identical, but very similar on their facts in order to be relevant. So I'm going to look at that very carefully, anecdotal evidence. It would have to deal [19] with situations that are very parallel to the situations that are at issue in this case. So I have to reserve on that.

MR. KIRBY: Your Honor, this is Pat Kirby. I would just ask the court to consider the method by which the plaintiffs are going to proffer this testimony, and keeping in mind with your prior instructions that we are to anticipate the issues. I would like some guidance by the

court as to whether or not the plaintiffs are going to be expected to submit affidavits or in camera –

THE COURT: Let me throw out this thought.

MR. EYMANN: That's fine with me. This is Dick Eymann. I misconstrued the original motion. I thought they wanted to blanket bar for this kind of testimony, so I don't have any problem with outlining ahead of time just as we discussed at the very beginning of the conversation with regard to bringing matters before the court, or if we can't agree, so I would be very happy to discuss with [sic] the testimony is going to be, and if there is a problem, then we can discuss it at the time.

THE COURT: Let's say if you can't agree on whether a particular scenario is very, very similar, then just outline it in a paragraph and submit it in advance and we can then get our teeth into it and hopefully make a sensible ruling

[20] MS. PRICE: Thank you, Your Honor.

THE COURT: I imagine that covers it, does it not? Doesn't that cover it, Mr. Kalamon, Mr. Kirby, your defendants' motions?

MR. KIRBY: Yes, it does, Your Honor.

THE COURT: And I think we've covered the plaintiffs motions.

MS. PRICE: Yes, Your Honor.

THE COURT: Is anything left today?

MR. EYMANN: I think we can take it up at the time. You denied Number 8, if I remember correctly, in the

plaintiffs' motion, and that I think is one that is based upon prior experience in a prior employment case that I had a few years ago, and I don't know if the court – all it is is the argument that occurred in that particular case was it doesn't make any difference what the jury was told in final arguments was that paying or providing any compensation, even if you find for the plaintiff, if you award any compensation in this case to the plaintiff, it's not going to do any good. It's not going to help anything, and that was something that the jury talked about a lot during deliberations apparently in that particular case. It seems to me that that is totally against the law and I was just wondering if the court understood where I was going on that Number 8.

* * *

[2] STATE OF WASHINGTON)
: Reporter's Certificate
COUNTY OF SPOKANE)

I, Mia Bohn, a Registered Professional Reporter and Official United States District Court Reporter;

DO HEREBY CERTIFY:

That the foregoing transcript of proceedings, pages 1 to 24 contains an accurate transcription to the best of my ability of the proceedings as reported by me using stenographic means, as held in the foregoing captioned case.

Further, that the transcript was prepared by me or under my direction.

DATED this 22 day of Nov 1999.

/s/ Mia Bohn
MIA BOHN, RPR
OFFICIAL U.S.
COURT REPORTER

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CONNIE HEMMINGS and PATTY LAMPHIEAR, Plaintiffs/Appellees/ Cross-Appellants v. TIDYMAN'S, INC., a WASHINGTON CORPORATION, Defendant/Appellant/ Cross-Appellee.	Nos. 99-35932 99-35984 CV 97-00068-WFN ORDER (Filed Aug. 8, 2002)

Before: PREGERSON, THOMAS, and GOULD, Circuit Judges.

The panel has voted to deny the petition for rehearing and the suggestion for rehearing en banc. The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on whether to rehear the matter en banc. See Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.